INSOL International

Module 2A

Guidance Text

UNCITRAL Model Law on Cross-Border Insolvency

2019/2020

INSOL INTERNATIONAL FOUNDATION CERTIFICATE in INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Welcome to **Module 2A**, dealing with the **UNCITRAL Model Law on Cross-Border Insolvency**. This Module is one of the compulsory module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of the UNCITRAL Model Law on Cross-Border Insolvency Law;
- a relatively detailed overview of the different parts of the Model Law, including the purpose and function of each part; and
- a relatively detailed overview of the practicalities in applying the Model Law as illustrated by appropriate case law.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST on 1 March 2020**. Please consult the Foundation Certificate in International Insolvency Law website for both the assessment and the instructions for submitting the assessment via the course web pages. Please note that no extensions for the submission of assessments beyond 1 March 2020 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law):

- the background and historical development of the Model Law;
- the purpose of the Model Law;
- the general provisions of the Model Law;
- access for foreign representatives and creditors under the Model Law;
- recognition of foreign proceedings and relief under the Model Law;
- co-operation with foreign courts and foreign representatives under the Model Law;
- concurrent proceedings under the Model Law;
- the UNCITRAL practice guide on cross-border insolvency co-operation;
- a judicial perspective on the Model Law; and
- the treatment of enterprise groups under the Model Law.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of the UNCITRAL Model Law on Cross-Border Insolvency; and
- be able to answer questions based on a set of facts relating to the Model Law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in the text.

3. RECOMMENDED READING (NOT COMPULSORY)

- **Working Group V Documents**: Working Group V Documents on Cross-Border Insolvency, which can be accessed via: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html

- **UNCITRAL Guide to Enactment**: UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014), which can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf

- **Legislative Guide– Parts One and Two**: The UNCITRAL Legislative Guide on Insolvency Law (2004), contains part one (Designing the Key Objectives and Structure of an Effective and Efficient Insolvency Law) and part two (Core Provisions for an Effective and Efficient Insolvency Law), can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

- **Practice Guide**: The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), which can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf

- **The Judicial Perspective**: The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (2011, updated 2013), which can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf

- **Legislative Guide – Part Three**: The UNCITRAL Legislative Guide on Insolvency Law – part three deals with treatment of enterprise groups in insolvency (2010) and can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf

- **Insolvency Related Judgments**: The UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf

4. THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY LAW: BACKGROUND AND HISTORICAL DEVELOPMENT[1]

4.1 Introduction

This part of the Module explores why the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) came about when it did, as well as who was involved in its development. When studying this part of the Module, please also ask yourself why the format of a model law (as opposed to, for example, a treaty or convention) was chosen and what this attempts to achieve.

The United Nations Committee on International Trade Law (UNCITRAL) was established by the United Nations (UN) General Assembly in 1966 to reduce or remove the obstacles to trade created by the disparities between the national laws governing international trade. With a focus on harmonisation and modernisation of international trade, the Commission[2] was regarded as the vehicle through which the UN could play a more active role in the field. UNCITRAL conducts its business through working groups and the Commission. Working groups are the fori that do the day-to-day work on developing legislative texts and at present UNCITRAL has six working groups.[3]

On 23 June 1993, in its twenty-sixth session, following a proposal made at the 1992 UNCITRAL Congress titled "Uniform Commercial Law in the 21st Century", UNCITRAL decided to pursue the issue of cross-border insolvency.[4] Since 1995, Working Group V (Insolvency Law) (WG V) has been working on cross-border insolvency.[5] On 30 May 1997, UNCITRAL adopted the Model Law on Cross-Border Insolvency which was subsequently adopted by the General Assembly in a resolution of 15 December 1997.[6]

But what is cross-border insolvency? In its most simple form, a "cross-border insolvency" arises when insolvency proceedings are commenced in one sovereign jurisdiction (or State) against an insolvent debtor that also has assets and / or liabilities in at least one other State.[7] In the most complex cases, a multinational enterprise (set up as a group of companies) may have business operations in dozens of States carried out by subsidiaries, branches and other affiliated entities, with a wide variety of different types of assets and liabilities in different locations and numerous different creditors.

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1 See generally Neil Hannan, *Cross-Border Insolvency - The Enactment and Interpretation of the UNCITRAL Model Law*, Chapter 2 "Development of the Model Law", Springer, 2017.

2 The Commission is an intergovernmental body that comprises 60 Member States elected by the General Assembly and which represent the world's various geographic regions and the principal economic and social systems.

3 Jenny Clift and Neil Cooper, *Celebrating 20 years of Collaboration*, INSOL International / UNCITRAL publication (May 2014), Chapter 2 "UNCITRAL – its history and mission", pp 1-2.

4 United Nations Commission on International Trade Law, *Possible Future Work, Note by Secretariat addendum, Cross Border Insolvency*, UN Doc A/CN.9/378/Add.4, 23 June 1993 ("Possible Future Work").

5 It should be noted that WGV does not exclusively deal with cross-border insolvency but also works on other aspects of insolvency law. See in this respect the "Working Group V Documents" mentioned in Section 3 "Recommended Reading" and also the UNCITRAL Legislative Guide, on Insolvency Law, with its various parts. UNCITRAL together with the World Bank are considered international standard-setting bodies for insolvency. The World Bank has its so-called "World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes" (http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf) and a Taskforce meets annually to align the insolvency related work both organisations undertake.

6 UNCITRAL Guide to Enactment, p 23 at para 16.

7 United Nations Commission on International Trade Law, *Possible Future Work*, *supra* note 4, at 10 where it is stated that: "Cross-border insolvency is the term frequently used for insolvency cases in which the assets of the debtor are located in two or more States, or where foreign creditors are involved. (…)"

4.2 Historical development

Why did UNCITRAL, more particularly WG V, decide to also focus on cross-border insolvency? This requires us to take a step back and look back at the historical development of its work. While trade was historically conducted primarily by individuals locally within their own home country, the 19th century saw the fast growing use of corporations (that is, separate legal entities) and in today's world, business and trade are increasingly international, crossing more jurisdictions than just the home country of the traders. This internationalisation and globalisation has been facilitated by more affordable international travel and the explosion of cross-border communications via the Internet and the use of devices such as iPhones, smart phones, tablets and the like.

In the area of insolvency law and the substantive rules dealing with financial difficulties or financial distress, most of the relevant substantive laws and rules of insolvency are jurisdiction-specific. Legal systems have over a long period of time developed rules to deal with the consequences of business failures, including an orderly and equitable distribution of the assets which are left to divide amongst the creditors of a failed business. However, when the assets of a business are spread across more than one State, it is difficult to conduct an orderly and equitable distribution of the assets due to the differences in laws, legal systems, political interests and self-interest that characterise each State. In other words, without anything else agreed between State A and State B, insolvency laws and rules of State A (even those declared by State A to have "universal effect") stop having any effect at the border of State B.

For some debtors with international activities, this territorial effect of a domestic insolvency is an incentive to conceal assets abroad outside of the insolvent estate and thereby make them unavailable for collective distribution to the creditors of that debtor. To combat such international fraud,[8] but also to incentivise international trade by making the consequences of an insolvency more predictable and transparent and at the same time combat the existing disharmony on cross-border insolvency issues amongst States, something was clearly needed to facilitate assistance between States in a cross-border insolvency.

Amongst the British Commonwealth countries a common law principle of "comity" was developed. This principle allows the courts in one common law State to recognise the courts in another common law State and to assist each other in the enforcement of their respective judgments to the extent permitted by each court's domestic laws and it further allows nominated persons in one State to obtain the assistance of the court in another State. A similar principle of "comity" was adopted in the United States of America (the "USA") where the US Supreme Court described the principle as follows:

> "'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[9]

8 UNCITRAL Guide to Enactment, p 21 at para 6.
9 *Hilton v Guyot* (1895) 159 US 113, 163-4.

In civil law jurisdictions an attempt is made to achieve the same result as comity by issuing enabling orders (also known as *exequaturs*), or the conclusion of *ad hoc* protocols, to establish co-operation and facilitate the administration in cross-border insolvency proceedings.[10]

Treaties (bilateral ones between two States, or multilateral ones amongst more than two States) are another way of dealing with assistance and recognition issues in a cross-border insolvency. However, treaties dealing with insolvency law have proven to be quite difficult to agree.[11] In Europe, for example, it took until 29 May 2000 for the European Council to adopt the Regulation on Insolvency Proceedings (the European Insolvency Regulation or EIR).[12] The EIR (which is not a treaty, but an EU Regulation which, following adoption, directly becomes part of the domestic law of each EU Member State) was the outcome of almost forty years of efforts[13] to establish a framework within which insolvency proceedings taking place in any EU Member State could be recognised and enforced throughout the rest of the European Union.[14]

The Model Law was established as a result of work done and pressure exerted by a number of groups, including INSOL International and the International Bar Association (IBA).[15] During its development, WG V took into account other international regulations and proposals from other non-governmental bodies.[16]

In 1994, UNCITRAL and INSOL held a colloquium at which it was recognised that:

> "despite concerns about the feasibility of a project to harmonise rules on international aspects of insolvency, the practical problems caused by the disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions."[17]

There was a high degree of support expressed at the colloquium for the Commission to commence a project on cross-border insolvency.

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10 United Nations Commission on International Trade Law, Report on UNCITRAL – INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 and 23 March 1995) UN Doc A/CN.9/413, 12 April 1995 ("UNCITRAL – INSOL Judicial Colloquium"), p 3 at para 10.

11 In *Possible Future Work*, *supra* note 4, it was acknowledged that "(…) while recognising the desirability of a workable system of cooperation between States in insolvency matters, it has also been pointed out in international discussions that it may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future. (…)".

12 Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, as recast in Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May, 2015.

13 In 1995, the European Community for example unsuccessfully proposed the introduction of the European Convention on Insolvency Proceedings.

14 In 2003 in North America, the American Law Institute published *Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among NAFTA Countries* in an attempt to develop principles and procedures for managing cross-border insolvency within NAFTA (North Atlantic Free Trade Agreement) countries.

15 UNCITRAL Guide to Enactment, p 22 at para 12.

16 Including, for example, the Model International Insolvency Act (MIICA) and the Cross-Border Insolvency Concordat developed by Committee J of the IBA. See also the initiatives listed in part III of *Possible Future Work*, *supra* note 4, including for Latin American States the Bustamant Code and the Montevideo Treaties, the Bankruptcy Convention (of 1933, as amended in 1977 and 1982) of the Nordic Council covering Denmark, Finland, Iceland, Norway and Sweden, and the Hague Conference on Private International Law. See also UNCITRAL Guide to Enactment p 22 at para 10.

17 United Nations Commission on International Trade Law, *Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency* (Vienna, 17-19 April 1994), UN Doc. A/CN.9/398, 19 May, 1994, at p 2, para 1. ("UNCITRAL-INSOL Colloquium").

A second colloquium was held in March 1995 for judges and government officials.[18] This Judicial Colloquium's consensus view was that:

> "the development by UNCITRAL of a legislative text of limited scope (e.g. in the form of model statutory provisions facilitating judicial cooperation and access and recognition) was both desirable and feasible."[19]

There was a prevailing sense of urgency, as the legal environment then in which solutions to cases of cross-border insolvency were crafted were characterised by "diversity and often inconsistency in legal approaches applied in cross-border insolvency, including the degree of discretion that might be available to judges in the absence of statutory authorisation.[20]

The Model Law does not attempt to substantively unify the insolvency laws of States. It also is not a treaty and does not contain any requirement of reciprocity. The Model Law is only a recommendation, not a convention, and can therefore be considered as an example of "soft law".[21] It is suitable for adoption, in whole or in part, into the domestic legislation of a State and premised on the following four key concepts:[22]

- **Access** - providing access of foreign representatives and creditors to courts;
- **Recognition** – recognition of foreign proceedings;
- **Relief** – providing appropriate relief; and
- **Co-operation** – facilitating co-operation with foreign courts and foreign representatives.

The Model Law has adopted several concepts, such as COMI (Centre of Main Interest)[23] and "establishment", similar to those contained in the EIR and it was envisaged that a similar interpretation would apply to such concepts and that the Model Law would complement the EIR.[24]

Following the adoption of the Model Law in 1997, a number of subsequent publications emerged that are of great assistance in interpreting and understanding the Model Law, including:

- **UNCITRAL Guide to Enactment** – the Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency which was first published in 1997 and has been amended over time;

- **Legislative Guide on Insolvency Law – Parts One and Two** - In 2005, UNCITRAL adopted its Legislative Guide on Insolvency Law, which was

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18 See generally UNCITRAL – INSOL Judicial Colloquium, *supra* note 10.
19 *Idem*, p 5 at para 22.
20 *Idem*, p 2 at para 5.
21 According to the UNCITRAL Guide to Enactment, p 24 at para 19 "A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require a State enacting it to notify the United Nations or other States that may have also enacted it."
22 "Approaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. (…)", UNCITRAL Guide to Enactment, p 21 at para 8.
23 While the Model Law does not have a definition of COMI, Art 16 para 3 of the Model Law does presume, in the absence of proof to the contrary, that the debtor's registered office, or habitual residence in the case of an individual, is the debtor's COMI.
24 UNCITRAL Guide to Enactment, p 44 at para 82, pp 46-47 at paras 88-90 and p 70 at para 144.

designed to foster and encourage the adoption of effective national insolvency regimes. In the Legislative Guide, UNCITRAL makes several comments about the Model Law and how it should be interpreted and its interrelationship with the EIR;

- **The Practice Guide on Cross-Border Insolvency Cooperation** - On 1 July 2009, UNCITRAL adopted the Practice Guide on Cross-Border Insolvency Cooperation, designed to provide information for practitioners and judges on the practical aspects of co-operation as envisaged in Article 27 of the Model Law;

- **The Legislative Guide – Part Three** – On 1 July 2010, UNCITRAL adopted the Legislative guide on Insolvency Law – Part Three which deals with the treatment of enterprise groups in insolvency;

- **The Judicial Perspective** - In December 2011, the UN General Assembly adopted the UNCITRAL publication "UNCITRAL Model Law on Cross-Border Insolvency - the Judicial Perspective.", which was updated in 2013.

Self-Assessment Exercise 1

How did the Model Law come about and why? Explain also whether the chosen format (that is, a model law) was deliberate and what this format attempts to achieve.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. PURPOSE OF THE MODEL LAW (PREAMBLE)

5.1 Introduction

This part of the Module uses the Preamble of the Model Law as a basis to explore the purpose of the Model Law and this should allow you to better understand what the Model Law does and does not do.

The Preamble of the Model Law is short and describes the purpose of the Model Law as an instrument to provide effective mechanisms for dealing with cases of cross-border insolvency, so as to promote the objectives of:

- Co-operation between the courts and other competent authorities of the State (that is, the State that has enacted the Model Law, hereinafter the "enacting State") and foreign States involved in cases of cross-border insolvency;
- greater legal certainty for trade and investment;
- fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- protection and maximisation of the value of the debtor's assets; and
- facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The Preamble is not intended to create substantive rights, but rather to provide general orientation for users of the Model Law and to assist in its interpretation.[25]

The purpose of the Model Law is not to attempt a substantive unification of insolvency law. Instead, the Model Law aims to provide a procedural framework for co-operation between jurisdictions (respecting differences among national procedural laws) and promotes a uniform approach to cross-border insolvency. The UNCITRAL Guide to Enactment[26] lists the following 7 solutions that should facilitate such a uniform approach:

1) **Access / Co-ordination / Relief**: Providing the person administrating a foreign insolvency proceeding (the "foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek temporary "breathing space" and allowing the courts in the enacting State to determine what co-ordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
2) **Recognition**: Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;
3) **Transparency**: Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;
4) **Co-operation**: Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;
5) **Authorise assistance abroad**: Authorising courts in the enacting State and persons administrating insolvency proceedings in the enacting State to seek assistance abroad;
6) **Jurisdiction and co-ordination in concurrent insolvency proceedings**: Providing for court jurisdiction and establishing rules for co-ordination where an insolvency proceeding in an enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and
7) **Co-ordination of relief**: Establishing rules for co-ordination of relief granted in the enacting State to assist two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

5.2 How does the Model Law fit in, in a domestic context?

The Model Law is meant to fit in and operate as an integral part of the existing insolvency law in the enacting State. This is evidenced by the following features of the Model Law:[27]

- **New terminology limited**: New legal terminology added by the Model Law to the existing insolvency law of the enacting State, is limited;[28]
- **Alignment of relief**: The Model Law allows for the alignment of relief resulting from the recognition of a foreign proceeding, with the relief available in a comparable proceeding under national law;[29]
- **Rights local creditors respected**: The recognition of foreign proceedings does not prevent local creditors from initiating or continuing collective insolvency proceedings commenced in the enacting State.[30]

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25 UNCITRAL Guide to Enactment, p 32 at para 46.
26 *Idem*, p 19-20 at para 3.
27 *Idem*, pp 25-26 at para 21.
28 For the key terms "foreign proceeding" and "foreign representative", see the guidance below on Chapter I (General Provisions of the Model Law).
29 Model Law, Art 20.
30 *Idem*, Art 28.

- **Compliance with local procedural and notice requirements**: The relief available to the foreign representative is subject to compliance with the procedural requirements of the enacting State and applicable notification requirements,[31] as well as to the protection of local creditors and other interested parties (including the debtor) against undue prejudice;[32]
- **Public policy safeguard**: The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding on the basis of overriding public policy considerations;[33]
- **Flexible form of Model Law**: The Model Law is in the flexible form of model legislation that takes into account differing approaches in national insolvency laws and the varying propensities of States to co-operate and co-ordinate in insolvency matters.[34]

5.3 What the Model Law does and does not do

The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting the Model Law therefore provides useful additions and improvements to the national insolvency regime so as to resolve more readily problems arising in cross-border insolvency cases.[35]

While the Model Law provides authorisation for cross-border co-operation and communication between courts and suggests various ways in which co-operation might be implemented, it does not specify how that co-operation and communication might be achieved, but rather leaves that up to each jurisdiction to determine by application of its own domestic laws and practices.[36]

The ability of the courts, with the appropriate involvement of parties, to communicate "directly" with, and to request information and assistance "directly" from, foreign courts or foreign representatives, is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.[37]

Self-Assessment Exercise 2

Please answer the following questions by answering TRUE (T) or FALSE (F) only.

1. The Model Law aims to provide enacting States with additional, modern and efficient substantive insolvency law fit for cross-border insolvencies? [T/F]

2. The procedural framework the Model Law provides to enacting States aims to make cross-border insolvencies in the enacting State more transparent and predictable in outcome? [T/F]

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31 *Idem*, Art 19(2).
32 *Idem*, Art 22.
33 *Idem*, Art 6. It should be noted, however, that it is expected that the public policy exception should only rarely be used.
34 *Idem*, Arts 25-27.
35 Judicial Perspective, p 9 at para 26.
36 *Idem*, p 10 at para 28.
37 *Idem*, pp 10-11 at para 29.

3. While fitting and operating as an integral part of the existing insolvency law of the enacting State, the Model law limits the enacting State's sovereignty because it introduces foreign law into the enacting State. [T/F]

4. With the enactment of the Model Law, a statutory basis is created in the enacting State for various forms of appropriate co-operation and direct communication between (foreign) courts and foreign representatives in cross-border insolvencies. [T/F]

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. GENERAL PROVISIONS OF THE MODEL LAW (CHAPTER I)

6.1 Introduction

Chapter 1 of the Model Law consists of articles 1- 8 and each will be briefly addressed in this part of the Module. Some key defined terms will be explored such as "foreign proceeding", "foreign representative", "main proceeding", and "non-main proceeding" as well as the so-called "public policy exception", which is an important safeguard for any enacting State. Chapter 1 further contains an important rule on interpretation of the Model Law and how the Model Law should be viewed vis-à-vis other international obligations of the enacting State, as well as the scope of the Model Law.

6.2 Scope of the Model Law (Article 1)

Article 1 deals with the scope of the Model Law and in paragraph 1 it outlines the types of issue that may arise in cases of cross-border insolvency for which the Model Law aims to provide solutions, such as:[38]

- Inward-bound requests for recognition of a foreign proceeding;
- Outward-bound requests from a court or insolvency representative in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State;
- Co-ordination of proceedings taking place concurrently in two or more States; and
- Participation of foreign creditors in insolvency proceedings taking place in the enacting State.

6.3 Exclusions

Paragraph 2 of Article 1 allows the enacting State to exclude certain proceedings from the application of the implemented Model Law.[39] In principle, the Model Law

[38] UNCITRAL Guide to Enactment, p 35 at para 53.

[39] In the United Kingdom, for example, the Cross-Border Insolvency Regulations 2006 ("CBIR"), which implements the Model Law, excludes certain water and sewage undertakers or qualified licensed water suppliers, Scottish Water, a protected railway company, a company licensed to provide air traffic services, a public private partnership company, a protected energy company, a building society, an English credit institution or EEA credit institution or any of their branches, a third party credit institution, certain insurers,

should apply to any proceeding that qualifies as a "foreign proceeding" within the meaning of Article 2(a) of the Model Law. However, banks and insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the Model Law, as they may require to be administered under a special regulatory regime.[40] Public utility companies or consumers/non-traders could – for policy reasons – also require special solutions in cross-border situations, but an enacting State should be careful not to inadvertently and undesirably limit the right of the insolvency representative or court to seek assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State, merely because that insolvency is subject to a special regulatory regime.[41] It is advisable to exclusions from the scope of the Model Law be expressly mentioned by the enacting State to make the national insolvency law more transparent (especially for the benefit of foreign users).

6.4 Key definitions (Article 2)

Article 2 contains a number of definitions, some of which are addressed in more detail below.

6.4.1 Foreign proceeding

A key definition is that of **"**foreign proceeding". This definition has the following elements:[42]

- a proceeding (including an interim proceeding);[43]
- that is either judicial or administrative;
- that is collective in nature;[44]
- that is in a foreign State;
- that is authorised or conducted under a law relating to insolvency;[45]
- in which the assets and affairs of the debtor are subject to control or supervision by a foreign court;[46] and
- which proceeding is for the purpose of reorganisation or liquidation.[47]

EEA insurers and certain reinsurers authorised by competent authorities in an EEA State and Channel Tunnel Concessionaires.

40 UNCITRAL Guide to Enactment, pp 35-36 at paras 55 and 56.

41 *Idem*, pp 36-37 at paras 57- 61.

42 For a discussion of each of the elements of the definition of "foreign proceedings", see The Judicial Perspective, pp 25-31 at paras 70-92.

43 The interim proceeding is addressed in the UNCITRAL Guide to Enactment, pp 42-43 at paras 79-80.

44 The collective proceeding element is addressed in the UNCITRAL Guide to Enactment, pp 39-40 at paras 69-70. A key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it – see The Judicial Perspective, p 25 at para 72).

45 This element is addressed in the UNCITRAL Guide to Enactment, p 41 at para 73. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules, irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency - The Judicial Perspective, p 28 at para 79).

46 This element is addressed in the UNCITRAL Guide to Enactment, p 41-42 at paras 74-76. The Model Law specifies neither the level of control or supervision required to satisfy this element of the definition, nor the time at which that control or supervision should arise and the control or supervision required may be potential rather than actual - The Judicial Perspective, p 30 at para 85).

47 This element is addressed in the UNCITRAL Guide to Enactment, p 42 at paras 77-78.

In a recent judgment by the English court in the *Agrokor*[48] case, a number of these elements where tested. As a systemically important company in Croatia, Agrokor (together with 50 of its affiliates) was subjected to the Extraordinary Administration Proceeding (EAP) under the newly adopted "Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in Croatia" (*Lex Agrokor*). Agrokor itself (without the 50 affiliates) made an application before the English court, under the Cross-Border Insolvency Regulations, for the Croatian Extraordinary Proceeding to be recognised. The application was opposed by Sberbank, a creditor with a claim in excess of EUR 1 billion. In the context of assessing whether the Croatian EAP qualified as a "foreign proceeding" the following questions were raised:

- is the *Lex Agrokor* a "law relating to insolvency"?;
- does it matter that the *Lex Agrokor* was not passed "for the purpose of reorganization"?;
- does the EAP qualify as "collective proceedings"?;
- is the EAP "subject to control or supervision by a foreign court"?;
- does it matter that the EAP is a single *group* proceeding in respect of Agrokor and its 50 affiliates, while the Cross-Border Insolvency Regulations (and the Model Law) only provide for recognition of a single *company* proceeding?;
- would recognition of the EAP in respect of Agrokor as "foreign proceedings" be "manifestly contrary to English public policy"?

The English court granted the requested recognition and all the objections were dismissed for the following reasons:[49]

- *Foreign law*: Characteristics of the *Lex Agrokor* are a matter of Croatian law and questions of foreign law are questions of fact to be decided by the English Court on the basis of expert evidence;
- *Single Group Proceedings*: None of the Model Law materials state that it is impossible to recognize a single group proceeding, such as the Agrokor EAP pursuant to the *Lex Agrokor*, as a foreign proceeding in respect of a single debtor (in this case Agrokor);
- *Law relating to insolvency*: The Model Law does not require "insolvency law" as a label; it is sufficient if the law deals with or addresses insolvency or severe financial distress, which the *Lex Agrokor* does. The "law relating to insolvency" requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding. At the commencement of the proceedings, it was unchallenged evidence that Agrokor and the wider group was in a state of serious financial distress;
- *Court supervision*: The level of court supervision required by the Model Law is relatively low. Under the Cross-Border Insolvency Regulations it can be potential, rather than actual and indirect rather than direct. The fact that the *Lex Agrokor* also gave some control to the Croatian government, did not negate the supervision of the court;

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48 *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch). It should be noted that an appeal has been lodged against this judgment, which at the time of finalising the guidance text for this Module had not yet resulted in decision.

49 In his memorandum opinion of 24 October 2018 in the Agrokor d.d. *et al* – case (Case No. 18-12104), granting recognition and enforcement of Foreign Debtors' Settlement Agreement within the territorial jurisdiction of the United States (the "US Chapter 15 Agrokor Opinion"), US Bankruptcy Judge Martin Glenn briefly discusses the Model Law recognition applications for the Croatian EAP in the jurisdictions of Slovenia (pp 20 and 21), Serbia (pp 21 and 22), Federation of Bosnia and Herzegovina (p 22) and Montenegro (pp 22 and 23). Unlike the English court, each of these jurisdictions denied recognition. However, like the English *Agrokor* decision, each of the decisions reached in first instance are presently subject to appeal.

- *Collective nature of the proceedings*: Sberbank asserted that "collective" should mean "relating to the debtor and its own creditors", not "to the debtor and creditors of others". However, the English court considered that the consolidated nature of the EAP made it more collective rather than not collective enough,
- *For the purpose of reorganization or liquidation*: The English court held that the purpose of the *Lex Agrokor* was to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty and, if a restructuring failed, by transforming it into a bankruptcy proceeding. This could be described as a law for the purposes of reorganisation or liquidation within the meaning the Cross-Border Insolvency Regulations.

6.4.2 Foreign representative

Another key definition is that of "foreign representative", which has the following elements:

- a person or body, including one appointed on an interim basis;
- authorised in a foreign proceeding;
- to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding.

Please note that the Model Law does not specify that the foreign representative must be authorised by the foreign court.[50]

By specifying the required characteristics of a "foreign proceeding" and a "foreign representative", the definitions limit the scope of application of the Model Law.[51]

6.4.3 Main or non-main proceedings[52]

The definition of "foreign main proceeding" uses the term "centre of main interest" (or COMI) of the debtor, without defining what it means. The definition of "foreign non-main proceeding" requires the debtor to have an "establishment", which term is defined in the Model Law in the same way as that term is defined in the European Insolvency Regulation, namely:

> "any place of operations where the debtor carries out a non-transitory[53] economic activity with human means and goods or services."[54]

For the purposes of the interpretation of the term "COMI" in the Model Law, the jurisprudence relating to this same term in the European Insolvency Regulation[55] and the so-called Virgos-Schmit Report, are relevant.

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50 The term "foreign court" is defined in Article 2(e) of the Model Law as "a judicial or other authority competent to control or supervise a foreign proceeding". See also the UNCITRAL Guide to Enactment, p 46 at para 86.

51 UNCITRAL Guide to Enactment, p 38 at para 63.

52 When dealing with members of enterprise groups in this context, it should be noted that, for the purposes of the Model Law, the focus is on individual entities and therefore on each and every member of an enterprise group as a distinct legal entity. See The Judicial Perspective, p 24 at para 68.

53 The Judicial Perspective, p 23 at para 64 notes that "(…) There is a legal issue as to whether the term "non-transitory" refers to duration of a relevant economic activity or to a specific location at which the activity is carried out."

54 The Judicial Perspective, p 47 at para 140 clarifies that: "(…) the presence alone of goods in isolation or bank accounts does not, in principle satisfy the requirements for classification as an "establishment".

55 The demise in 2009 of the business empire of Sir Allen Stanford due to alleged involvement in a fraudulent "Ponzi" scheme, has in the UK resulted in two interesting decisions in respect of the Antigua incorporated Standard International Bank Limited ("SIB"): in the first instance the 3 July 2009 judgment by Lewison J [2009] EWHC 1441 (Ch) and in appeal the Court of Appeal (CA) decision [2010] EWCA 137 (CA). This

The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 of the Model Law, the co-ordination (under Chapter IV of the Model Law) of the foreign proceeding with proceedings that may be commenced in the enacting State, and with concurrent proceedings under Chapter V of the Model Law.[56]

Thus, a foreign proceeding that is not opened in the jurisdiction of the debtor's COMI and does not have at least an establishment in the enacting State, cannot be recognised as a foreign proceeding for purposes of the Model Law.

6.5 Supremacy of other international obligations (Article 3)

Article 3 expresses the principle of supremacy of international obligations of the enacting State over internal law. If the enacted Model Law conflicts with a treaty or other form of multi-State agreement of the enacting State, then that treaty or international agreement prevails.[57] In a restructuring of an airline, for example, the treaty obligations under the Convention on International Interest in Mobile Equipment (also known as the Cape Town Convention)[58] may take priority over the Model Law if the enacting State is a party to the Cape Town Convention.

6.6 Competent court or authority (Article 4)

Article 4 allows the enacting State to clarify if any functions relating to recognition and co-operation under the Model Law are performed by an authority other than a court.[59] The value of article 4 would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.[60]

6.7 Domestic representative authorised in foreign proceedings (Article 5)

Article 5 intends to equip insolvency representatives (or other authorities) appointed in insolvency proceedings commenced in the enacting State, to act abroad as foreign representatives of those proceedings.[61] Article 5 further makes it clear that the scope

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involved a contested case under the CBIR (*supra* note 39) between two rival applications for recognition in the UK by separate foreign office-holders appointed over SIB: (i) liquidators appointed in Antigua and (ii) a receiver appointed by the United States Securities and Exchange Commission (SEC). These judgments deal with the determination of COMI (and the different approaches taken in the UK and the US in this respect) as well as whether the US receivership could qualify as a "foreign proceeding" for purposes of the CBIR. The CA agreed with the conclusion of Lewison J that the US receivership was not a foreign proceeding for the purposes of the CBIR, but that the Antiguan liquidation was such a foreign proceeding. The purpose of the US receivership was to prevent detriment to investors, rather than to reorganise the corporation or to realise assets for the benefit of all creditors. It was further decided that the presumption as to SIB's COMI had not been rebutted and that, accordingly, the Antiguan liquidation was the foreign main proceeding. The CA further emphasized that – as set forth in *In re Eurofood IFCS Ltd* ((Case C-341/04) [2006] Ch 508) – COMI had to be identified by reference to factors which are both "objective and ascertainable" by third parties. Thus the so-called "head office function" test applied only to the extent that the relevant factors were so ascertainable. See also The Judicial Perspective, p 27 at para 77, where reference is made to a US court of appeal decision regarding SIB that concluded differently from the English CA and found the US receivership to be a collective proceeding.

56 *Idem*, p 43, para 81.

57 *Idem*, pp 48-49, paras 91- 93.

58 The Cape Town Convention can be accessed via the following link: https://www.unidroit.org/instruments/security-interests/cape-town-convention.

59 Including government-appointed officials (typically civil servants) who carry out their functions on a permanent basis. See UNCITRAL Guide to Enactment, p 50, paras 97-98.

60 UNCITRAL Guide to Enactment, pp 49-50, paras 94-98.

61 *Idem*, p 51, para 99.

and power exercised abroad by the insolvency representative would depend upon the foreign law and courts.[62]

6.8 The public policy exception (Article 6)[63]

Article 6 contains the so-called public policy exception. For the enacting State, the exception should provide comfort as the ultimate safeguard to its sovereignty, which the Model Law respects. However, the use of the expression "manifestly" in this exception emphasizes that public policy exceptions should be interpreted restrictively and should only apply in exceptional circumstances concerning matters of fundamental importance for the enacting State.[64]

In the *Agrokor* case,[65] the English court clarified that "manifestly" raises the threshold considerably higher than merely "contrary to English public policy". Sberbank argued (unsuccessfully) that (i) the substantive consolidation aspects of the Croatian EAP and (ii) the lack of a right of creditors to object to the compromise of their claims, was manifestly contrary to English public policy. Differences in the Croatian EAP in comparison to an English proceeding (including in respect of priority rules) is not enough, according to the English court. However, a breach of the full and frank disclosure obligation a foreign representative has towards the court to which a recognition application under the Model Law is made, may amount to an abuse of process and as such justify a denial of the requested recognition based on the public policy exception.[66]

6.9 Additional assistance under domestic laws (Article 7)

Article 7 makes it clear that the Model Law does not aim to displace any existing cross-border assistance provisions in the law of the enacting State.[67] Under the US Chapter 15 (the Chapter of the Bankruptcy Code under which the Model Law was enacted), any "additional appropriate relief" is provided for in section 1507(b) which states that a court, in determining whether to provide additional assistance, shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure:[68]

- just treatment of all holders of claims against or interests in the debtor's property;
- protection of claim holders in the USA against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- prevention of preferential or fraudulent dispositions of property of the debtor;

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62 *Idem*, p 51, para 100.

63 See generally The Judicial Perspective, pp 18-20 at paras 48-54 where it is made clear that the notion of "public policy" is grounded in domestic law and may therefore differ from State to State. The *Ephedra* case is mentioned as an example to demonstrate that the public policy exception should only be exercised in very exceptional circumstances. The inability to have a jury trial in Canada on certain issues to be resolved in the Canadian proceedings, in circumstances in which there was a constitutional right to such a trial in the USA, was held **not** to be manifestly contrary to the public policy of the USA.

64 UNCITRAL Guide to Enactment, p 52, para 104.

65 See note 48, *supra*, and the discussion in that part of the guidance text.

66 This was the decision reached by the English judge Snowden J on 12 January 2016 in *Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch). See also, the decision of 5 December 2017 by the English judge Vos J in *Cherkasov & Ors v Olegovich* [2017] EWHC 3153 (Ch) which was another case in which the full and frank disclosure obligation towards the court was significantly breached by, in this case, a Russian foreign representative.

67 UNCITRAL Guide to Enactment, p 53, para 105.

68 See p 41 of the US Chapter 15 *Agrokor* Opinion, *supra* note 49, where s 1507(b) was addressed in a reference of the judgment in *In re Atlas Shipping*, 404 B.R. 746 at 740 [Bankr. S.D.N.Y. 2009].

- distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

6.10 Interpretation of the Model Law (Article 8)

Article 8 clarifies that in the interpretation of the Model Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.[69]

Self-Assessment Exercise 3

Question 1

Explain how the definitions of "foreign proceeding" and "foreign representative" limit the application of the Model Law.

Question 2

Explain why both the public policy exception and its restrictive application are important.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

7. ACCESS FOR FOREIGN REPRESENTATIVES AND CREDITORS (CHAPTER II)

7.1 Introduction

Chapter II of the Model Law consists of Articles 9-14, which each will be briefly addressed in this part of the Module. The provisions provide for standing before the courts in the enacting State for both the foreign representative and creditors, as well as non-discrimination principles ensuring that foreign creditors have the same rights as local creditors and benefit from timely notice of events taking place in the enacting State. In short, these access rights and non-discrimination principles aim to save time and expense, which in turn avoid value destruction and, in certain cases may even facilitate value creation. They also provide comfort and transparency, which should make it easier for the foreign debtor (and other companies) to do business in the enacting State without counter-parties of the foreign debtor becoming concerned that the foreign debtor does this.

7.2 Standing (*locus standi*)

The access granted to a foreign representative is primarily standing in the courts of the enacting State, without the need to meet formal requirements such as licenses or consular action.

[69] UNCITRAL Guide to Enactment, p 53, paras 106-107.

Article 9 expresses this principle of direct access by a foreign representative to courts of the enacting State.[70] No recognition of the foreign proceeding opened in the foreign State is required in the enacting State to provide the foreign representative with standing in the courts of the enacting State, but such access does not automatically vest the foreign representative with any other rights or powers.

Article 11, like Article 9, focuses on providing standing to the foreign representative in the courts of the enacting State, but in this case to request the commencement of a domestic insolvency proceeding in the enacting State without otherwise modifying any of the conditions for the opening of such a proceeding.[71] Again, no prior recognition of the foreign proceeding is required for this type of access.[72]

Article 12 is another article that provides the foreign representative with standing, but this time recognition of the foreign proceeding is required for this standing to be available. When a domestic insolvency proceeding in the enacting State is opened in respect of the debtor, and following recognition of the foreign proceeding in the enacting State, the foreign representative will have standing to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or co-operation with the foreign proceeding. However, article 12 does not vest the foreign representative with any specific powers or rights.[73]

7.3 Safe Conduct Rule

A so-called “safe conduct” rule is provided for in **Article 10** ensuring that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding. This article responds to concerns of foreign representatives and creditors about exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

7.4 Anti-discrimination principle

Foreign creditors have the same rights as creditors domiciled in the enacting State regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State. This access right for foreign creditors is expressed in **Article 13**, in which it is further clarified that this access does not affect the ranking of claims in the enacting State, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor. The footnote to Article 13 provides wording for States that refuse to recognise foreign tax and social security claims, allowing them to continue to discriminate against such claims.[74]

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70 *Idem*, p 55, para 108.

71 It should be noted in this context that, according to Art 31 of the Model Law, recognition of a foreign main proceeding (ie, where the COMI of the debtor is located in the jurisdiction where the foreign proceedings have commenced) provides, in the absence of evidence to the contrary, proof that the debtor is insolvent for purposes of opening a domestic insolvency proceeding under the laws of the enacting State.

72 UNCITRAL Guide to Enactment, p 57, paras 112-114.

73 *Idem*, p 58, paras 115-117.

74 *Idem*, p 60, paras 119-120.

7.5 Timely Notice

While the Model Law leaves a discretion to the court to decide otherwise in a particular case, foreign creditors are further entitled to *individual* notification of, amongst other things, the commencement of the local proceedings regarding the debtor under the insolvency law of the enacting State and of the time-limit to file claims in those proceedings. This is expressed in **Article 14** as well as the equal treatment principle requiring that foreign creditors should be notified whenever notification is required for local creditors in the enacting State. To ensure timely notice by expeditious means, Article 14 states "no letters rogatory or other, similar formality required". The traditional "diplomatic channels" are too cumbersome and time-consuming in the context of insolvency proceedings and therefore not adequate. Paragraph 3 of Article 14 specifies what a notification to a foreign creditor of commencement of a proceeding in the enacting State should include. This should address any conflict with treaty obligations of the enacting State and, for secured creditors in particular, provide clarification as to what (if anything) they need to do. For example, in some jurisdictions the filing of a claim by a secured creditor is deemed to be a waiver of their security interest.[75]

Self-Assessment Exercise 4

Explain how access rights and non-discrimination principles in Chapter II of the Model Law may give foreign investors comfort in the jurisdiction of the enacting State.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

8. RECOGNITION OF FOREIGN PROCEEDINGS AND RELIEF (CHAPTER III)

8.1 Introduction

This part of the Module discusses Chapter III of the Model Law which consists of articles 15-18, dealing with recognition and articles 19-24, dealing with relief. While there are certain requirements for recognition, they are relatively easy to meet and recognition is further facilitated by certain presumptions the court in the enacting State can rely on. Under the Model Law, the COMI of the debtor, which is not a defined term, determines the consequences of the recognition. If the COMI is in the jurisdiction where the foreign proceedings have been opened, the proceedings are main insolvency proceedings with automatic mandatory relief. If the debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are non-main proceedings without automatic relief, but only discretionary post-recognition relief granted by the court. There is no reciprocity requirement and there is an ongoing duty to keep the court updated on developments. Urgent interim relief can be granted prior to the recognition decision after the recognition application has been filed, provided the interests of the debtor's creditors and other interested parties are adequately protected. Recognition also provides the foreign representative with standing to exercise local avoidance powers

[75] *Idem*, pp 61-63, paras 121-126.

and the right to intervene in local insolvency proceedings. There are limits to the relief that is deemed to be appropriate to grant under the Model Law. In that context a number of English cases will be briefly discussed, including the *Rubin v Eurofinance* case, the so-called *Pan Ocean* case and the so-called *IBA* case, in which the so-called *Gibbs* Rule (or the Rule in *Gibbs*) will be addressed, as well as the IBA case appeal.

8.2 Recognition

8.2.1 Benefits

The Model law is intended to expedite and simplify the process required to recognise foreign proceedings and to provide a clear framework for obtaining recognition. This is done by prescribing straightforward and easy-to-meet conditions for obtaining recognition of a foreign proceeding in the enacting State. The clear benefit of recognition in the enacting State of a foreign proceeding opened in another foreign State is that there is no need to open separate insolvency proceedings in the enacting State. In certain respects, the foreign proceedings in the foreign State are treated in the enacting State as if local insolvency proceedings had been opened in the enacting State, without the need in fact to open such proceedings. As will be addressed under "relief" below, recognition allows the foreign representative to access certain of the tools and protections available to a local insolvency office-holder in the enacting State. Significant cost and time can be saved and complications avoided as the foreign representative - through the recognition process – is able to request tailor-made relief without the need to commence local insolvency proceedings. A good example is the ability of a foreign representative to seek powers allowing the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, liabilities and affairs more generally. The use of such powers, if granted, can assist in gathering information to ascertain whether insolvency "claw-back" actions (vulnerable transactions) or claims against the directors, exist.

8.2.2 Requirements and presumptions

Recognition and relief are related concepts. The object of the recognition principle is to avoid lengthy and time-consuming processes by providing prompt resolution of applications for recognition. This brings certainty to the process and enables the receiving court, once recognition has been given, to determine questions of relief in a timely fashion.[76]

The evidential requirements for recognition of a foreign proceeding are set forth in Article 15 of the Model Law. If those requirements are met, recognition will be granted pursuant to Article 17 of the Model Law. In deciding whether the foreign proceeding should be recognised, the court in the enacting State is further limited to the jurisdictional pre-conditions set out in the definition of "foreign proceeding" as set forth in Article 2(a) of the Model Law. The court of the enacting State is not to embark on a consideration of whether the foreign proceeding for which recognition is requested was correctly commenced under the applicable law of the foreign State.[77]

[76] The Judicial Perspective, pp 14-15, para 39.
[77] *Idem*, p 15, para 41.

8.2.3 Recognition requirements (Article 15)

Article 15 provides as follows:

- A foreign representative may apply to the court for recognition of the foreign proceeding to which the foreign representative has been appointed.
- An application for recognition shall be accompanied by:
  a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; **or**
  b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; **or**
  c) in the absence of evidence referred to in subparagraphs a) and b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.
- Any application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- The court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting State.

8.2.4 Recognition presumptions (Article 16)

Article 16 sets forth the following presumptions concerning recognition:

- If the decision or certificate referred to in article 15 paragraph 2 indicates that the foreign proceeding is a proceeding within article 2(a) (of the Model Law) and that the foreign representative is a person or body within the meaning of article 2(d) (of the Model Law), the court is entitled to presume so.
- The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.
- In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

8.2.5 Recognition decision (Article 17)

Article 17 makes it clear that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time (paragraph 3) and recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist (paragraph 4). In the absence of public policy grounds in the enacting State for denying a request for recognition, such request made before the competent court of the enacting State – pursuant to article 4 of the Model Law – shall be granted as a matter of course if the requirements of Article 15(2) of the Model Law are met,[78] the foreign proceeding qualifies as such in accordance with the definition of Article 2(a) of the Model Law and the foreign representative qualifies as such in accordance with the definition of Article 2(d) of the Model Law (paragraph 1). If the foreign proceeding takes place in the State where the debtor has its COMI, the foreign proceedings will be recognised as foreign main proceedings (paragraph 2(a)) and if the debtor only has an establishment in the

[78] Although the court in the enacting State is not bound by the orders and decisions made by the originating court in the foreign State and required to satisfy itself that the foreign proceeding meets the requirements of Arts 2 and 15(2), the court in the enacting State can rely on the presumptions set forth in Art 16(1) and (2). See also UNCITRAL Guide to Enactment, p 74, para 152.

foreign State where the foreign proceedings were opened, then the foreign proceedings will be recognised in the enacting State as foreign non-main proceedings (paragraph 2(b)).

8.2.6 Reciprocity

In the context of recognition, there is no reciprocity requirement in the Model Law. In other words, it is not envisaged that a foreign proceeding will be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State.[79] However, some States, when enacting the Model Law, have included reciprocity provisions in relation to recognition.[80] These reciprocity requirements significantly undermine the effectiveness of the Model Law and in certain cases there is no practical effect at all following adoption of the Model Law, as the South African approach to reciprocity demonstrates.[81] In South Africa the 2000 Cross-Border Insolvency Act that introduced the Model Law, continues to be dormant because the reciprocity requirement adopted in South Africa requires certain countries to be designated as meeting the reciprocity requirement and so far no State has been designated as such.

8.2.7 COMI[82]

While the concept of COMI is fundamental to the operation of the Model Law, there is no definition of COMI in the Model Law itself. However, the UNCITRAL Guide for Enactment[83] does provide some guidance. Similar to the COMI concept under the European Insolvency Regulation,[84] the two key factors for determining COMI under the Model Law are:

- the location where the central administration of the debtor takes place; and
- which is readily ascertainable as such by creditors of the debtor.

Depending on the circumstances, the court may need to give greater or less weight to a given factor, but in all cases the determination of the COMI is a holistic endeavour designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by its creditors. Additional factors that could be considered by a court to determine the debtor's COMI include, but are not limited to, the following:[85]

- the location of the debtor's books and records;
- the location where financing was organised or authorised;
- the location from where the cash management system was run;
- the location in which the debtor's principal assets or operations are found;

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79 The Judicial Perspective, p 18, para 47.

80 Examples of such States are Mexico, the British Virgin Islands, Romania, Mauritius, South Africa and Uganda.

81 See eg S. Chandra Mohan, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012), *International Insolvency Review*, 21, (3), 199-233, available at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3097&context=sol_research.

82 Although the COMI concepts in the EIR and the Model Law are similar, they serve different purposes. In the EIR the determination of COMI relates to the jurisdiction in which main proceedings should be commenced. In the Model Law the determination of COMI relates to the effects of recognition, in particular the relief available to assist the foreign proceeding - The Judicial Perspective, p 33, para 95).

83 See in particular the UNCITRAL Guide to Enactment, pp 70-72, paras 144-149 and pp 75-76 at paras 157-160.

84 *Idem*, p 44, para 82.

85 Please note that the list of additional factors is not set out in order of priority.

- the location of the debtor's primary bank;
- the location of employees;
- the location in which commercial policy was determined;
- the site of the controlling law or the law governing the main contracts of the debtor;
- the location from which purchasing and sales policy, staff, accounts payable and computer systems are managed;
- the location from which contracts (for supply) were organised;
- the location from which reorganisation of the debtor was being conducted;
- the jurisdiction whose law would apply to most disputes;
- the location in which the debtor was subject to supervision or regulation; and
- the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

The appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding.[86] While the COMI of a debtor can move, if such a move is in close proximity (timing-wise) to the commencement of the foreign proceedings, the appropriate evidence for this will be harder to establish, in particular the requirement that the COMI must be readily ascertainable by third parties, such as creditors of the debtor.

8.2.8 Abuse of process[87]

The Model Law itself does not contain a provision on abuse of process, but leaves it to domestic law and the procedural rules of the enacting State to determine what constitutes an abuse of process. However, the Model Law also does not explicitly prevent a court in the enacting State from responding to a perceived abuse of process. In this context it should be noted that a foreign representative has an obligation to full and frank disclosure to the court in the enacting State. If a foreign representative breaches this obligation by, for example, falsely claiming that the COMI of the debtor is in a particular State, or where the foreign representative has inappropriate alternative motives for the recognition application which are not disclosed to the court, then the court could consider this to be abuse of process based on domestic law and procedural rules which could affect the recognition application.[88]

In this context it should further be noted that, as a general rule the public policy exception (of article 6 of the Model Law) should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

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86 Please note that in the US judgment of *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013) the Second Circuit of Appeals took a slightly different approach towards the date for determination of the debtor's COMI. The US court held that: "(…) a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition [ie the US implementation of the Model Law] is filed, as the statutory text suggests. But given the EIR and other international interpretations, which focus on the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith. (…)" [Slip Op. at 23/34]. As far as COMI factors are concerned, the US court further held that: "(…) any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis. (…)" [Slip Op at 24].

87 See generally, UNCITRAL Guide to Enactment, p 76, para 161.

88 See in this context the decision of the English judge Snowden J on 12 January 2016 in *Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch) and the decision of 5 December 2017 by the English judge Vos J in *Cherkasov & Ors v Olegovich* [2017] EWHC 3153 (Ch).

8.2.9 Ongoing obligation to update court on developments (Article 18)

Article 18 requires the foreign representative, from the time of filing the recognition application for the foreign proceeding, to promptly inform the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.[89]

8.3 Relief

Even prior to a decision on the recognition application, the court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on **Article 19** of the Model Law. While **Article 21** of the Model Law sets out the court's discretionary power to provide post-recognition relief, **Article 20** of the Model Law provides for automatic mandatory relief in case the recognised foreign proceeding qualifies as a foreign main proceeding. **Article 22** of the Model Law clarifies in paragraph 1 that, in granting or denying relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief), the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. For that purpose, the court is granted the power to subject relief to conditions it considers appropriate (paragraph 2) and at the request of the foreign representative or an affected person the court may further modify or terminate the relief (paragraph 3).

A consequence of a recognition decision is also, according to **Article 23** of the Model Law, that the foreign representative obtains standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor (that is, claw-back rights and the power to avoid antecedent transactions). Another consequence of recognition according to **Article 24** of the Model Law, is the right of the foreign representative to intervene in any local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements for this.

8.3.1 Appropriate relief (Article 21)[90]

Upon recognition of a foreign proceeding (whether main or non-main), Article 21(1) of the Model Law provides the court in the enacting State with the discretionary power – where necessary to protect the assets of the debtor or the interest of creditors and at the request of the foreign representative – to grant appropriate relief, including:[91]

- staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been (automatically) stayed under Article 20(1)(a) of the Model Law;
- staying execution against the debtor's assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;

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89 The Judicial Perspective, p 17, para 44 also emphasizes the continuing duty of disclosure the foreign representative has.

90 See generally UNCITRAL Guide to Enactment, pp 87-89 at paras 189-195 and The Judicial Perspective, pp 57-64, paras 168-186.

91 UNCITRAL Guide to Enactment, pp 87-88, para 189 clarifies that: "(…) The types of relief listed in article 21(1) are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case."

- suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(c) of the Model Law;
- providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the court;
- extending any interim relief granted pursuant to Article 19(1) of the Model Law; and
- granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

Paragraph 2 of Article 21 provides the court in the enacting State with discretionary power – at the request of the foreign representative – to hand over all or a part of the debtor's assets located in the enacting State to the foreign representative (or another person designated by the court), provided that the court is satisfied that the interests of the local creditors in the enacting State are adequately protected. As far as granting relief to a foreign representative of a foreign non-main proceeding is concerned, the court must – according to paragraph 4 of Article 21 – be satisfied that the relief relates to assets that – under the law of the enacting State[92] – should be administered in the foreign non-main proceeding, or concerns information required in that proceeding. In short, such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

8.3.2 Automatic relief when a foreign main proceeding is recognized (Article 20)[93]

The recognition of a foreign main proceeding (that is, where the COMI of the debtor is in the jurisdiction where the foreign proceeding was opened) has the following three automatic effects:

a) a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
b) a stay of execution against the debtor's assets; and
c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

These automatic consequences are intended to allow time for steps to be taken to organize an orderly and fair cross-border insolvency proceeding. As the stay set forth in paragraph a) above also covers actions before an arbitral tribunal, Article 20 in effect establishes a mandatory limitation to the effectiveness of an arbitration agreement. However, if the arbitration does not take place in either the enacting State or the State where the foreign main proceedings are opened, it may nevertheless be difficult to enforce the stay of the arbitral proceedings. It should further be noted that paragraph 2 of Article 20 allows for appropriate protections to be included in the law of the enacting State so as to provide the court in the enacting State with authority to modify or terminate the automatic stay or suspension contemplated by paragraph 1 of Article 20 if it would be contrary to legitimate

[92] This proviso reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding, as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

[93] See generally UNCITRAL Guide to Enactment, pp 83-86, paras 176-188 and The Judicial Perspective, pp 55-56, paras 161-167.

interests of a party in interest (including the debtor itself). For example, the interests of the parties may be a reason for allowing an arbitral proceeding to continue. Other exceptions that may exist in the law of the enacting State are, for example, the enforcement of claims by secured parties, initiation of court action for claims that have arisen after the commencement of the insolvency proceedings (or after recognition of a foreign main proceeding) or the completion of open financial-market transactions. Article 20 further clarifies, in paragraph 3, that the automatic stay and suspension contained in paragraph 1 does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. Paragraph 4 also clarifies that the automatic stay and suspension contained in paragraph 1 does not affect the right to request the commencement of certain domestic insolvency proceedings, or the right to file claims in such a proceeding.

8.3.3 Interim collective relief prior to recognition of a foreign proceeding (Article 19)[94]

Where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, the court of the enacting State may, at the request of the foreign representative, grant relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This interim relief – which applies to both foreign main and foreign non-main proceedings - can include:

- a stay of execution against the debtor's assets;
- entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- any of the following post-recognition relief provided for in Article 21 of the Model Law:
  a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
  b) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and
  c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

Paragraph 2 of Article 19 allows the enacting State to include an appropriate notice of the interim relief granted. If the interim relief would interfere with the administration of a foreign main proceeding, the court may – based on paragraph 4 of Article 19 – refuse to grant such interim relief.[95]

8.3.4 Limits to appropriate relief (Article 21)

While Article 21(1) of the Model Law is drafted broadly, the appropriate relief the court of the enacting State can grant is not unlimited. In the next paragraphs three English cases will be briefly addressed in which the English court has determined certain limits to the appropriate relief under the Model Law it believes it is able to

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94 See generally UNCITRAL Guide to Enactment, pp 80-81, paras 170-175 and The Judicial Perspective, pp 50-52, paras 150-156.

95 In this context it should be recalled that pursuant to Art 15(3) of the Model Law, the foreign representative must attach to the recognition application a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

grant. In the first case, the English Supreme court concludes that the enforcement of an insolvency-related *in personam*[96] default judgment is not covered by the Model Law. In the second case, the English first instance Court concludes that – in effect – applying foreign insolvency law to an English law governed contract is outside the scope of appropriate relief the English court can grant. In the third case, of which both the decisions in first instance and appeal are addressed, the English court determined that it did not have jurisdiction to grant the Azeri foreign representative of a foreign main proceeding opened in Azerbaijan an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order. It should be noted, however, that if these same cases had been judged in a different jurisdiction, for example in the United States, the outcomes may have been different.[97]

8.3.4.1 Rubin v Eurofinance SA[98]

In the UK, the Model Law has been implemented by way of the Cross-Border Insolvency Regulations 2006 (the CBIR). In *Rubin v Eurofinance* the English Supreme Court was asked to rule on the question whether – pursuant to the CBIR – a US judgment based on insolvency avoidance powers, obtained in default of the appearance of the defendants, could be recognised and enforced in the UK.[99] Under English common law principles of private international law,[100] a foreign court outside the UK has jurisdiction to deliver a judgment capable of enforcement or recognition in the UK only when the judgment debtor:

a) was present in the foreign jurisdiction when the proceedings commenced;
b) had made a claim or counterclaim in the foreign proceedings;
c) had submitted to the jurisdiction by voluntarily appearing in the proceedings; or
d) had agreed to submit to the jurisdiction.

The Supreme Court approached the issue as one of pure policy and rejected the claim for recognition and enforcement of the insolvency related *in personam* default judgment. Accepting it would have amounted to creating a new rule that does not yet exist, as it would create a difference between insolvency-related judgments and non-insolvency judgments. According to the Supreme Court this is a matter for Parliament, not judge-made law and the CBIR does not include any express provision dealing with enforcing a foreign insolvency-related judgment against a third party.[101]

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96 Latin for a judgment "directly related towards a particular person", enforceable against that person.

97 For the second case, the *Re Condor Insurance Co Ltd* 601 F 3d 319 (Fifth Circuit 2010) may provide a basis for a US court to come to a different decision than the English court.

98 [2010] UKSC 46.

99 This case did not deal with the recognition of the insolvency proceedings or granting of assistance within those proceedings.

100 Dicey, Morris & Collins, *Conflict of Laws* – Rule 43 in the 15th ed, 2012, paras 14R-054.

101 It should be noted that in its 51st session (25 June -13 July 2018) UNCITRAL adopted the Model Law on recognition and enforcement of insolvency-related judgments (the "Model Law on IRJ"), the text of which can be accessed via the following link: http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf, which aims to remedy the uncertainty created by the *Rubin v Eurofinance* decision and clarifies in Art X that appropriate relief under the Model Law includes the recognition and enforcement of insolvency-related judgments. However, whether following the adoption of the Model Law on IRJ in the UK, the English Supreme Court would decide the *Rubin v Eurofinance* case differently, is still uncertain and may depend, *inter alia*, on how the English Supreme Court would interpret and apply the grounds for refusing recognition and enforcement set forth in Art 14(g) of the Model Law on IRJ. See also "UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-related Judgments" by Jenny Clift and Neil Cooper in *INSOL World* – Fourth Quarter 2018, pp 24-25.

8.3.4.2 Fibria Celulose S/A v Pan Ocean Co Ltd[102]

This case will be referred to as the *Pan Ocean* case. In short, the facts in the *Pan Ocean* case were as follows. A long term English law shipping contract between a Brazilian company and a Korean company contained a so-called *ipso facto* clause (allowing termination of the contract upon one of the parties entering into insolvency proceedings). The Korean company filed for Korean insolvency proceedings under which Korean insolvency law declares *ipso facto* clauses null and void. The Korean liquidator, as foreign representative, made an application in the UK pursuant to the CBIR for recognition of the Korean insolvency proceedings as foreign main proceedings and the Korean liquidator also requested the English court to grant relief. Under the relief requested, the Korean liquidator tried to prevent the Brazilian party from exercising the *ipso facto* clause which under Korean insolvency law is deemed to be null and void. The English court considered the following two possible grounds for the requested relief:

- relief under Article 21(1)(a) – that is, a stay on "the commencement or continuation of individual actions or individual proceedings"; and
- appropriate relief under article 21(1)(g) – that is, to make available the relief that would have been available under Korean insolvency law.

In respect of the first ground, the English court considered that the service of a notice to terminate the contract is not the commencement or continuation of an individual action or proceedings. Therefore, the court does not have the power under Article 21(1(a) of the Model Law to restrain the Brazilian party from serving the termination notice. In respect of the second ground, the English court also rejected providing the requested appropriate relief as:

- it did not consider the intention of "appropriate relief" in this context to include allowing the recognising court to go beyond the relief it would grant in a domestic insolvency;
- in *Belmond Park v BNY Corporate Trustee Services*[103] the English Supreme Court clarified that *ipso facto* clauses are in principle valid and enforceable in a UK insolvency;
- in the present case, the parties should not have expected that under the chosen English law, the English court would apply Korean insolvency law; and
- accepting or rejecting *ipso facto* clauses in an insolvency is a policy decision and there is no good reason for the English court to prefer the policy decision made in Korea over the policy decision made in the UK.

8.3.4.3 The UK "rule in Antony Gibbs" or the "Gibbs Rule"

The so-called "rule in Antony Gibbs" or Gibbs Rule[104] derives from the 1890 case, *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*.[105] In short, the Gibbs Rule stands for the general proposition that a debt governed by

[102] [2014] EWHC 2124 (Ch).
[103] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38.
[104] The background to which is explained by the Court of Appeal in paras 23-26 of their decision of 18 December 2018 [2108] EWCA Civ 2802 (the *IBA* case appeal).
[105] (1890) LR 25 QBD 399. On p 5 of the US Chapter 15 Agrokor Opinion (*supra*, note 49), the US Bankruptcy Judge Martin Glenn summarised the Gibbs case as follows: "(…) the essence of the decision is that where a debtor, in that case domiciled in France, made a contract governed by English law and to be performed in England, was declared a bankrupt and its debts discharged under foreign law in a foreign proceeding (the, French law in a French proceeding), the plaintiff was not bound by the discharge and could maintain an action on the contract and recover damages in an English court. (….)"

English law cannot be discharged or compromised by a foreign insolvency proceeding. Discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.[106] However, the Gibbs Rule does not apply if the relevant creditor submits to the foreign insolvency proceeding, the rationale being that the creditor will be taken to have accepted that the law governing the foreign insolvency proceeding should determine the contractual rights that a creditor has elected to vindicate in that proceeding.[107] In particular, in the context of granting relief under the Model Law the Gibbs Rule has given English courts pause and raised the question as to what extent the Gibbs Rule is compatible with "the principles of (modified) universalism", which are part of English (common) law as well.[108]

8.3.4.4 The IBA case[109]

Mr Justice Hildyard had to extensively address the Gibbs Rule in the IBA case[110] – which is presently on appeal to the English Supreme Court – where an Azeri foreign representative, Ms Gunel Bakhshiyeva, following an earlier recognition order under the CBIR, requested appropriate relief under article 21 of the Model Law in the form of an indefinite continuation of the automatic moratorium that resulted from the earlier recognition order (the "Moratorium Continuation Application"). This Moratorium Continuation Application was contested by two creditors (the "Challenging Creditors") of the OJSC International Bank of Azerbaijan (IBA), who had unpaid claims against IBA under debt instruments governed by English law and had not submitted to the foreign insolvency proceedings in Azerbaijan to which IBA was subject, so the exception to the Gibbs Rule did not apply to the Challenging Creditors. A restructuring of IBA had taken place in Azerbaijan and a restructuring plan was approved which – pursuant to Azeri law – was binding on all creditors of IBA (including the Challenging Creditors). The concern was that, once the Azeri restructuring proceeding for IBA had ended, the Challenging Creditors would go to the UK and enforce their English law claims against IBA before an English Court arguing that, based on the Gibbs Rule, the Azeri restructuring plan of IBA cannot discharge the English law obligations of IBA towards the Challenging Creditors. In short, the Moratorium Continuation Application aimed to – in practice – prevent the Challenging Creditors from enforcing their English law claims while at the same time allowing the English court to recognise (pursuant to the Gibbs Rule) that the English law claims of the Challenging Creditors still exist and were not discharged – from an English law perspective – under the Azeri restructuring plan of IBA.[111]
While the High Court of Singapore has held that in its application of common law the Gibbs Rule does not apply,[112] Mr Justice Hildyard concluded that "there [is] presently and at this level no real doubt as to the continued application of the rule in Gibbs" and "there is similarly no real doubt that the fact of foreign insolvency, even one

[106] Description of the Gibbs Rule by Mr Justice Hildyard in *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Sberbank of Russia, et al.* [2018] EWHC 59 (Ch) (the "*IBA* case") at 44.
[107] The *IBA* case, *supra* note 106, at 46.
[108] It should be noted that if the Model Law on IRJ is adopted and implemented in the UK, the Gibbs Rule would be overridden by the mandatory obligation set forth in Article 13 to recognise and enforce insolvency related judgments.
[109] *Supra*, note 106.
[110] It should be noted that while the *IBA* case went on appeal which resulted in the decision of 18 December 2018 in the IBA case appeal, *supra* note 104, that decision is now subject to a further appeal to the English Supreme Court. That further appeal had not yet resulted in a decision at the time the guidance text for this module was finalised.
[111] It is important to note that the Foreign Representative did not contend that the Azeri restructuring plan of IBA would substantially fail if the Moratorium Continuation Application did, though the plan will not be complete and perfect in its application in that event (*IBA* case, *supra*, note 106, at 39.)
[112] *Pacific Andes Resources Development Ltd* [2016] SGHC 210 at 48 (*IBA* case, *supra* note 106, at 53).

recognised formally in this jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or given them 'overriding effect' over ordinary principles of English contract law."[113] The real question in the IBA Case was therefore whether the principles of "modified universalism" as expressed in the common law and in the Model Law (on which the CBIR is based), nevertheless enables the court to grant relief calculated to advance those principles without upsetting the Gibbs Rule, when properly understood and confined. More particularly, the question was whether at one and the same time the Gibbs Rule may formally be observed by accepting the continuation of the rights which English law confers, and yet the principles of modified universalism and the Model Law and the CBIR given effect to by preventing the exercise of those rights by a stay or moratorium.[114]

In the end, Mr Justice Hildyard denied the relief requested in the Moratorium Continuation Application as in his opinion a permanent stay cannot be deployed as the way round the Gibbs Rule.[115] In support of the Moratorium Continuation Application, examples were given showing that in practical terms the Gibbs Rule may have a limited scope in the context of a foreign liquidation because of the ability of the foreign liquidator to apply for an order remitting the English assets to the foreign liquidation. While acknowledging that the *IBA* case does not involve a foreign liquidation, but a foreign restructuring, there are precedents for making a distinction between the strict definition of legal rights and their enforcement, when applying the Gibbs Rule.[116]

But how could the relief requested in the Moratorium Continuation Application exist if there were no foreign proceeding or no foreign representative as defined in the CBIR anymore?[117] Mr Justice Hildyard considered in this context the decision of Mr Justice Norris in *Re BTA Bank JSC*[118] (the *BTA* case),[119] where the Kazakh bank BTA Bank JCS (BTA Bank) was subject to restructuring proceedings in Kazakhstan and a restructuring plan was approved by 93.8% of the affected creditors and sanctioned by the Kazakh court. Prior to the termination of the Kazakh restructuring proceeding of BTA Bank, the foreign representative applied to the English court for an order that the automatic stay of Article 20 of the Model Law was made permanent and such order was granted by Mr Justice Norris.[120] Mr Justice Hildyard found the *BTA* case decision to be insufficiently persuasive because in that case, unlike in the *IBA* case, the relief application was unopposed and no opposing creditors had emerged yet. Therefore, Mr Justice Norris approached the matter on the basis that the stay would only be permanent if and so long as it remained unopposed, and if any opposing creditors wished to challenge the stay then a more complete argument would be required. However, in the *IBA* case Mr Justice Hildyard was confronted with the question Mr Justice Norris expressly stated in the *BTA* case was not necessary for him to determine and on which he considered it therefore unnecessary for him to express a view.[121]

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113 *IBA* case, *supra*, note 106, at 57, and see further also at 51-56.
114 *Idem*, at 58-59.
115 *Idem*, at 155.
116 *Idem*, at 71-75.
117 *Idem*, at 90.
118 [2012] EWHC 4457 (Ch).
119 Another judgment of Justice Norris addressed and considered by Mr Justice Hildyard, was that in the case of *re Atlas Bulk Shipping A/S Larsen and others v Navios International Inc* [2012] Bus LR 1124 (the "*Atlas Bulk* case") where relief based on Art 21 of the Model Law was granted to restrain the right to rely on set-off under English law in the context of a Danish insolvency proceeding. Compared to the *IBA* case, the differences and context in the Atlas Bulk Case were so material that Mr Justice Hildyard did not consider it analogous (*IBA* case, *supra*, note 106, at 116-124).
120 *IBA* case, *supra*, note 106, at 106-110.
121 *Idem*, at 113-115.

The *Pan Ocean* case (as addressed above in Section 8.3.4.2) was also considered by Mr Justice Hildyard.[122] In the *Pan Ocean* case the relief sought was, in effect, to apply Korean insolvency law regarding *ipso facto* clauses. In the *IBA* case Mr Justice Hildyard found that, as a matter of substance, the Moratorium Continuation Application sought a court order which had the intended effect of forever preventing the exercise by the Challenging Creditors of an English law right in order to conform the position of the Challenging Creditors to that they would be recognised as having under Azeri insolvency law, rather than English contract law. What was sought could not sensibly be distinguished from a discharge or variation of the right itself; its depiction as merely procedural belied its true and intended effect. In order words, the relief requested was presented as procedural, but was calculated to be substantive in its effect. Mr Justice Hildyard concluded that the *Pan Ocean* case correctly affirms that the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect (and has been fashioned with the intention) of conforming the rights of English creditors with the rights which they would have under the relevant foreign law.

Even if Mr Justice Hildyard had concluded that he had jurisdiction to grant the relief based on Article 21 of the Model Law as requested in the Moratorium Continuation Application, he made it clear that he may still not have exercised his discretion due to the balancing of interests exercise he is required to undertake pursuant to Article 22 of the Model Law (which will be further addressed in section 8.3.5). Can the rights of a creditor under English law ever be "adequately protected" by intervention which, if effect and intention, negates or varies the rights? This is the question that Mr Justice Hildyard had to ask himself.[123] Another relevant factor in the context of exercising his discretion was, according Mr Justice Hildyard, that IBA could have sought to promote a parallel scheme of arrangement in the UK, which would admittedly have carried additional expense and possibly class issues.[124] Finally, Mr Justice Hildyard also considered that the introduction of the Model Law on Insolvency Related Judgments[125] may solve the problem created by the Gibbs Rule in a restructuring context.[126]

8.3.4.5 IBA case appeal[127]

In the *IBA* case appeal, the English Court of Appeal upheld the decision in the court of the first instance by Mr Justice Hildyard and focused in particular on the jurisdictional question raised. The question raised was in what sense it may be said that the English court lacked jurisdiction to grant the indefinite Moratorium Continuation requested by the foreign representative?[128] According to the Court of Appeal, the case did not involve an issue of jurisdiction in the strict sense (that is, the court had no power to deal with and decide the dispute). Instead, the real issue in this case was whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would:

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[122] *Idem*, at 129-146.
[123] *Idem*, at 158(4).
[124] *Idem*, at 158(5).
[125] *Supra*, note 101.
[126] *IBA* case, *supra*, note 106, at 160.
[127] See note 104, *supra*, for the case citation.
[128] *IBA* case appeal, *supra* note 104, at 83.

a) in substance prevent the English creditors (that is, the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule; and / or
b) prolong the stay after the Azeri reconstruction has come to an end.

The Court of Appeal answered both (a) and (b) in favour of the respondents (the Challenging Creditors).[129]

As far as (a) above is concerned, the court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things: first, the stay would have to be *necessary* to protect the interests of IBA's creditors and, secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied.[130]

Based on the evidence presented to the court, it concluded that the IBA creditors needed no further protection in order for the foreign proceeding to achieve its purpose. While it could theoretically be argued that the IBA creditors who participated in the restructuring plan of IBA could be prejudiced if the ability of IBA to repay the new corporate bonds (that were issued as part of the plan) was jeopardised by the successful enforcement by the English creditors of their stayed claims, the court regarded this as being "far too indirect and imponderable a consideration to satisfy the test of necessity in article 21(1) of the Model Law."[131]

The court further found it to be material in this context that IBA could in principle have promoted a parallel scheme of arrangement in the UK, but chose not to do so. If the power to grant a stay under article 21 of the Model Law had been intended to override the substantive rights of creditors under the proper law governing their debts, one would, according to the Court of Appeal, expect this to have been made explicit, or at the very least to have been the subject of discussion and a positive recommendation at the preparatory stage.[132]

In respect of (b) above, the Court of Appeal considered that the information obligation on the foreign representative contained in article 18 of the Model Law, regarding a substantial change in the status of the foreign proceeding and the status of the foreign representative's own appointment, requires the foreign proceeding to still be in existence and the foreign representative to still be in office. From this, the strong implication is, according to the Court of Appeal, that once the foreign proceeding has come to an end and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate. The court further held that had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose.[133]

The different approach taken in the US on these issues was not further explored by the Court of Appeal, as the background to the incorporation of the Model Law in the US differs significantly from that in Great Britain. As for the change in Azeri legislation that now makes it possible to further extend the life of the Azeri foreign proceeding of IBA (while its termination date was originally 30 January 2018), the

[129] *Idem*, at 84-85.
[130] *Idem*, at 86.
[131] *Idem*, at 87.
[132] *Idem*, at 88-89.
[133] *Idem*, at 97-98.

Court of Appeal held that, as a matter of substance, the original purpose of the Azeri reconstruction was achieved before the termination date in January 2018 and IBA is now trading normally. While the reconstruction plan is being kept alive artificially, as an insolvency proceeding it has served its purpose and run its course.[134]

8.3.5 Balancing interests (Article 22)[135]

The court in the enacting State must strike an appropriate balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by the relief. Article 22 specifically mentions the interests of creditors, the debtor and other interested parties. These interests should guide the court in exercising its discretionary powers to grant interim relief in Article 19 and post-recognition relief in Article 21. Relief can be tailored by subjecting it to certain conditions (Article 22(2)) or by modifying or terminating relief that has been granted (Article 22(3)).

8.3.6 Power to avoid antecedent transactions (Article 23)[136]

The standing afforded to the foreign representative in Article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding. Any actions of individual creditors fall outside the scope of Article 23. It should further be noted that Article 23 is drafted narrowly. It only ensures that a foreign representative is not prevented from initiating any action to avoid antecedent transactions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State. By distinguishing between main and non-main proceedings in paragraph 2 of Article 23, it is clear that the relief in a non-main proceeding is likely to be more restrictive than for a main proceeding.

8.3.7 Standing (locus standi) to intervene in local proceedings (Article 24)[137]

Article 24 is limited to standing only to avoid a denial of standing because local procedural legislation in the enacting State may not have contemplated the foreign representative amongst those having such standing. The proceedings where the foreign representative might intervene (if all local requirements for such intervention have otherwise been met) could only be those proceedings which have not been stayed under Article 20 or Article 21 of the Model Law.

8.3.8 Benefits

The automatic relief available under the Model Law, specifically the stay of actions or of enforcement proceedings, is necessary to provide “breathing space” until appropriate measures are taken for reorganisation or liquidation of the assets of the debtor. The suspension of transfers provides an immediate restriction preventing multinational debtors from moving money and property across international boundaries, which is essential to prevent fraud and protect the legitimate interests of the parties involved until the position can be assessed and investigated, as necessary. The ability to apply for discretionary relief under the Model Law affords foreign representatives maximum flexibility and the ability to devise bespoke solutions tailored to the circumstances of the debtor and other interested parties.

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[134] *Idem*, at 100-101.
[135] See generally UNCITRAL Guide to Enactment, pp 90-91, paras 196-199.
[136] *Idem*, pp 91-92, paras 200-203.
[137] *Idem*, pp 93-94, paras 204-208.

Finally, the ability to seek preliminary relief on an urgent basis on the filing of an application for recognition can help prevent dissipation of assets and preserve the *status quo* for the benefit of stakeholders generally until the application can be heard.

Self-Assessment Exercise 5

Question 1

How is a court in an enacting State likely to rule on a request for recognition of a foreign proceeding opened in a foreign State where the debtor has certain assets? Explain the steps the court will have to take.

Question 2

Would your answer be different if the debtor had its registered office in the foreign state, but not its COMI?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

9. CO-OPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES (CHAPTER IV)

9.1 Introduction

Cross-border co-operation is dealt with in articles 25-27 of the Model Law.[138] As many jurisdictions lack a legislative framework for co-operation and co-ordination between judges in different jurisdictions, the Model Law fills a gap by expressly empowering courts to extend co-operation in certain specific areas. The objective is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results. A further aim is to help promote consistency of treatment of stakeholders across different jurisdictions. Such consistency, in turn, should enhance both transparency and predictability in cross-border insolvency cases. It should further avoid traditional time-consuming and cost-inefficient procedures, such as letters rogatory and requests for consular assistance. Co-operation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Also, to the extent that cross-border judicial co-operation in the enacting State is based on the principle of comity, the Model Law offers an opportunity for making that principle more concrete and adapting it to the particular circumstances of cross-border insolvencies.

9.2 Domestic courts - mandatory co-operation and direct communication with foreign courts or foreign representatives (Article 25)

Article 25(1) provides that in cross-border insolvencies covered by Article 1 of the Model Law, the court must co-operate to the maximum extent possible with foreign courts or foreign representatives. Article 25(2) further provides that the court in the enacting State is entitled to communicate directly with, or to request information or

[138] *Idem*, pp 94-99, paras 209-223 and The Judicial Perspective, pp 65-76, paras 187-222.

assistance directly from, foreign courts and foreign representatives. Co-operation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere. As co-operation is not limited to foreign proceedings that would qualify for recognition under Article 17 of the Model Law, co-operation may also be available with respect to proceedings that are neither foreign main nor non-main proceedings on the basis of presence of assets.

9.3 Domestic insolvency office-holder - mandatory co-operation and direct communication with foreign courts or foreign representatives (Article 26)

In the exercise of its functions and subject to the supervision of the court in the enacting State, the insolvency office-holder (i) must co-operate to the maximum extent possible with foreign courts or foreign representatives (Article 26(1)) and (ii) is entitled to communicate directly with foreign courts and foreign representatives (Article 26(2)).

9.4 Means of co-operation (Article 27)

Article 27 provides an indicative list of the types of co-operation that are authorised by the Model Law. The list is illustrative rather than exhaustive in order to avoid precluding certain forms of appropriate co-operation and limiting the ability of courts to fashion remedies in keeping with specific circumstances. The non-exhaustive list of appropriate means of co-operation is set out in Article 27, and includes:

- the appointment of a person or body to act at the direction of the court;
- communication of information by any means considered appropriate by the court;
- co-ordination of the administration and supervision of the debtor's assets and affairs;
- approval or implementation by courts of agreements concerning the co-ordination of proceedings;
- co-ordination of concurrent proceedings regarding the same debtor; and
- any additional forms of examples the enacting State may wish to list.

In addition, the following guidance is provided regarding appropriate communication:[139]

- communication between courts should be done carefully with appropriate safeguards for the protection of the substantive and procedural rights of the parties;
- communication should be done openly, with advance notice to the parties involved and in the presence of the parties, except in extreme circumstances;
- various communications might be exchanged, including formal court orders or judgments, informal writings of general information, questions and observations and transcripts of court proceedings;
- means of communication include telephone, video link, facsimile and e-mail; and
- where communication is necessary and is used appropriately, there can be considerable benefits for the parties involved in, and affected by, the cross-border insolvency.

[139] See in particular, The Judicial Perspective, pp 67-66, paras 192-193.

9.5 The Practice Guide

As far as co-operation is concerned, the Practice Guide expands upon the forms of co-operation set out in Article 27 and incorporates, via sample clauses, practice and experience with the use of cross-border insolvency agreements or protocols. See paragraph 11 below for more details about the Practice Guide.

Self-Assessment Exercise 6

Explain how co-operation under the Model Law relates to access and recognition under the Model Law?

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

10. CONCURRENT PROCEEDINGS (CHAPTER V)

10.1 Introduction

This part of the guidance text addresses Chapter V of the Model Law , which consists of Articles 28 – 32.[140] This Chapter provides for a hierarchy of proceedings in case more than one insolvency proceeding is opened in respect of a certain debtor. In short, the hierarchy is as follows:

1) in the case of a foreign main or non-main proceeding and a domestic insolvency proceeding in the enacting State, primacy is given to the domestic proceeding (Articles 29);
2) in the case of a foreign main proceeding and a foreign non-main proceeding, primacy is given to the foreign main proceeding (Article 30(a) and (b)); and
3) in the case of more than one foreign non-main proceeding, no foreign proceeding is *a priori* treated preferentially (Article 30(c)).

10.2 The supremacy of domestic insolvency proceedings

The recognition of a foreign main proceeding will not prevent the commencement of domestic insolvency proceedings in the enacting State, provided that the debtor has assets in this State (Article 28). It would, however, not be contrary to the policy underlying the Model Law for the enacting State to adopt a more restrictive test, for example for the debtor to have at least an establishment in the enacting State before domestic insolvency proceedings can be opened. While, typically, a domestic insolvency proceeding is limited to assets located in the enacting State, in certain situations it may be meaningful for the local insolvency proceeding to also include certain assets abroad, especially when there is no foreign proceeding necessary or available in the foreign State where these foreign assets are situated. Article 28 of the Model Law caters for such an extension, albeit subject to the following two restrictions:

[140] See generally, UNCITRAL Guide to Enactment, pp 100-107, paras 224-241 and The Judicial Perspective, pp 67-66, paras 192-222.

- the extension must be necessary to implement co-operation and co-ordination under articles 25-27 of the Model Law; and
- the foreign assets included in the extension must be administered under the domestic law of the enacting State.

Concurrent domestic insolvency proceedings and foreign proceedings can exist either:

- at the time of the application for recognition of the foreign proceedings in the enacting State (Article 29(a)) – **Situation 1**; or
- after recognition, or the filing of the application for recognition, of the foreign proceeding (Article 29(b)) – **Situation 2.**

In **Situation 1**, any relief granted either on an interim basis based on Article 19, or post-recognition based on Article 21, must be consistent with the domestic insolvency proceedings. In the case of a foreign main proceeding, the automatic relief of Article 20 does not apply. Also, in granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that (Article 29(c)):

- the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding; or
- the relief concerns information required in the foreign non-main proceeding.

In **Situation 2**, any relief granted under either article 19 or article 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the domestic insolvency proceeding. For a foreign main proceeding, the same applies to any automatic relief that had been granted. For a foreign non-main proceeding, the requirements set out in article 29(c) apply as well.

It should be noted in this context that the commencement of domestic insolvency proceedings does not prevent or terminate the recognition of a foreign proceeding.

10.3 Concurrent foreign main and non-main proceedings

If the foreign main proceeding was recognised first in the enacting State, then any relief granted thereafter under either article 19 or article 21 to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding (Article 30(a)). If the application for recognition or the recognition of the foreign non-main proceeding comes first, then once the foreign main proceeding is recognised in the enacting State, any relief in effect under article 19 or article 21 must be reviewed by the court and must be modified or terminated if inconsistent with the foreign main proceeding (Article 30(b)).

10.4 Concurrent foreign non-main proceedings

In the event of two concurrent foreign non-main proceedings, the court must grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings (Article 30(c)). However, the Model Law does not contain any rule of preference between concurrent foreign non-main proceedings.

10.5 Presumption of insolvency (Article 31)

For the purposes of opening a domestic insolvency proceeding for the debtor in the enacting State, Article 31 of the Model Law provides for a rebuttable presumption that the recognition of a foreign main proceeding is proof that the debtor is insolvent.

10.6 The hotchpot rule (Article 32)

In essence, the hotchpot rule intends to avoid situations in which a creditor might obtain more favourable treatment than the other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. The rule does not affect the ranking of claims as established under the law of the enacting State. The hotchpot rule as set out in Article 32, reads as follows:

> **"**Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State, may not receive a payment for the same claim in a [domestic proceeding in the enacting State] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionally less than the payment the creditor has already received."

So, if a creditor has already received a 5% payment on its claim in a foreign proceeding regarding the debtor and the rate of distribution is for example 15% in the debtor's domestic insolvency proceeding in the enacting State, then, in order to place this creditor in the same position as the other creditors of the same class in the domestic insolvency proceeding, this creditor would receive a rate of distribution of 10% instead of 15%.

Self-Assessment Exercise 7

Question 1

Discuss whether you, in view of the policy underlying the Model Law, find the supremacy of domestic insolvency proceedings understandable or surprising, or perhaps both.

Question 2

Answer True or False to the following questions:

2.1 An enacting State requiring at least an establishment in its own jurisdiction for the commencement of domestic insolvency proceedings, violates article 28 of the Model Law. [T/F]

2.2 A domestic insolvency proceeding in the enacting State cannot include foreign assets of the foreign debtor. [T/F]

2.3 If a domestic insolvency proceeding already exists in the enacting State when a foreign main proceeding is recognised, there is no automatic relief pursuant to Article 20 of the Model Law. [T/F]

2.4 If after a foreign non-main proceeding is recognised, a domestic insolvency proceeding is opened in the enacting State, the recognition of the non-main proceeding terminates. [T/F]

2.5 For the opening of a domestic insolvency proceeding in the enacting State, there is a rebuttable presumption that the recognition of a foreign non-main proceeding is proof that the debtor is insolvent. [T/F]

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

11. UNCITRAL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY CO-OPERATION

11.1 History

The Practice Guide arose from a proposal made to the Commission in 2005. A first draft was developed through consultations in 2006 and 2007, presented for discussion to UNCITRAL Working Group V in November 2008, and circulated to Governments for comment in late 2008. A revised version was finalised and adopted by consensus on 1 July 2009 and on 16 December 2009, the General Assembly adopted resolution 64/112 in which appreciation for the completion and adoption of the Practice Guide was expressed.

11.2 Purpose

The purpose of the Practice Guide is to provide information for practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases, based upon a description of collective experience and practice with a focus on the use and negotiation of cross-border insolvency agreements (which are also referred to as “protocols”).

11.3 Content

Chapter I of the Practice Guide introduces the various international texts relating to cross-border insolvency proceedings and discusses the increasing importance of co-ordination and co-operation in such proceedings. Article 27 of the Model Law, in particular the approval and implementation by courts of agreements concerning the co-ordination of proceedings (article 27(d)) is the focus of Chapter II of the Practice Guide. Various cross-border insolvency agreements (including so-called “sample clauses” contained therein) are analysed in detail in Chapter III. Finally, Annex I to the Practice Guide provides summaries of 44 cases in which the cross-border insolvency agreements that form the basis of the Practice Guide, were concluded.

11.4 Sample clauses

Issues typically addressed in cross-border insolvency agreements include some or all of the following:[141]

[141] Practice Guide, p 37, paras 28, 29, 35 and 36.

a) in respect of the different courts and insolvency representatives involved, an allocation of responsibility for various aspects of the conduct and administration of proceedings, including limitations on authority to act without approval;
b) the availability and co-ordination of relief;
c) co-ordination of the recovery of assets for the benefit of creditors generally;
d) the submission and treatment of claims;
e) the use and disposal of assets;
f) methods of communication (including language, frequency and means);
g) the provision of notice;
h) the co-ordination and harmonisation of reorganisation plans;
i) agreement-related issues (including amendment, termination, interpretation, effectiveness and dispute resolution);
j) the administration of proceedings (for example, stays or standstills);
k) choice of applicable law;
l) allocation of responsibilities between contract parties;
m) costs and fees;
n) rights of appearance (*locus standi* or standing) before the courts involved;
o) safeguards (for example, no derogation from court authority, public policy and applicable domestic law, disclosure to interested parties, protection of rights of non-signatory third parties, ability to revert to the court in case of dispute, and warranty of contract parties that they each of authority to enter into the agreement);
p) corporate governance (including composition of the board of directors, actions the board can take and the procedures to follow in doing so, the relationship between management and shareholders, board and shareholders); and
q) management of information flows.

The Practice Guide has various alternative sample clauses under the following headings:

a) Background;[142]
b) Scope, purpose and goals;[143]
c) Resolution of disputes;[144]
d) Stays of proceedings;[145]
e) Investigation of assets;[146]
f) Distribution;[147] and
g) Effectiveness and conditions precedent to effectiveness.[148]

Other sample clauses included in the Practice Guide are clauses relating to: language,[149] terminology and rules of interpretation,[150] comity and independence of courts and allocation of responsibilities between courts,[151] treatment of claims,[152] insolvency representatives,[153] deferral,[154] right to appear and be heard,[155] future

[142] *Idem*, pp 45-46.
[143] *Idem*, pp 47-48.
[144] *Idem*, p 63.
[145] *Idem*, pp 70-71.
[146] *Idem*, pp 87-88.
[147] *Idem*, p 89.
[148] *Idem*, p 108.
[149] *Idem*, p 48.
[150] *Idem*, pp 49-50.
[151] *Idem*, p 61.
[152] *Idem*, p 62.
[153] *Idem*, pp 62-63.
[154] *Idem*, pp 63-64.
[155] *Idem*, p 64.

proceedings,[156] priority of proceedings,[157] applicable law,[158] general means of co-operation,[159] supervision of the debtor and reorganisation plans,[160] treatment of assets: supervision by the courts,[161] allocation of responsibilities for commencing proceedings,[162] submission of claims, claims verification and admission and post-commencement finance,[163] communication between courts,[164] communication between the parties: information-sharing between insolvency representatives,[165] communication between the parties: sharing information with other parties and notice,[166] confidentiality of communication[167], amendment, revision and termination,[168] costs and fees,[169] preservation of rights,[170] preservation of jurisdiction,[171] and limitation of liability and warranties.[172]

Self-Assessment Exercise 8

How does the Practice Guide compare to the co-operation provisions contained in the Model Law?

For commentary and feedback on self-assessment exercise 8, please see APPENDIX A

12. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE

12.1 History

The Judicial Perspective was adopted by UNCITRAL on 1 July 2011, following a request made by judges attending the Eighth Judicial Colloquium co-hosted by UNCITRAL, INSOL International and the World Bank in Vancouver (Canada) in 2009. In 2013 it was updated to reflect the revisions to the UNCITRAL Guide to Enactment in the same year, as well as jurisprudence issued between July 2011 and 15 April 2013 applying and interpreting the Model Law.

12.2 Purpose

The aim of the Judicial Perspective is to discuss the Model Law from a judge's perspective. Rather than providing an article-by-article analysis of the Model Law, the

156 *Idem*, pp 64-65.
157 *Idem*, p 70.
158 *Idem*, p 71.
159 *Idem*, p 85.
160 *Idem*, p 86.
161 *Idem*, p 87.
162 *Idem*, p 88.
163 *Idem*, p 89.
164 *Idem*, pp 102-103.
165 *Idem*, pp 103-104.
166 *Idem*, p 104.
167 *Idem*, p 105.
168 *Idem*, p 108.
169 *Idem*, p 110.
170 *Idem*, p 112.
171 *Idem*, p 113.
172 *Ibid*.

text is ordered so as to reflect the sequence in which particular decisions would generally be made by a receiving court under the Model Law. In the text of the Judicial Perspective, reference is made to 30 decisions given in a number of jurisdictions and which are summarised in Annex I to the Judicial Perspective. No attempt is made to critique the decisions, beyond pointing out issues that a judge may want to consider should a similar case come before him or her. The Judicial Perspective does not purport to instruct judges on how to deal with applications for recognition and relief under their domestic legislation enacting the Model Law. All that is offered is general guidance on the issues a particular judge might need to consider. Flexibility of approach is all-important in an area where the economic dynamics of a situation may change suddenly.

12.3 Content

In paragraphs 4 to 10 of this guidance text, references have already been made to the relevant parts of the Judicial Perspective alongside references to the UNCITRAL Guide to Enactment.

Self-Assessment Exercise 9

How does the Judicial Perspective relate to the UNCITRAL Guide to Enactment?

For commentary and feedback on self-assessment exercise 9, please see APPENDIX A

13. DEALING WITH ENTERPRISE GROUPS IN CROSS-BORDER INSOLVENCY CASES

13.1 History

The treatment of enterprise groups in insolvency is addressed in part three of the UNCITRAL Legislative Guide on Insolvency (Legislative Guide – Part Three). The Legislative Guide arose from a proposal made in 1999 that UNCITRAL should undertake further work on insolvency law, especially corporate insolvency. In December 2000 an international colloquium was held, organised in conjunction with INSOL International and the IBA, and a first draft of the Legislative Guide was considered by UNCITRAL Working Group V in July 2001 with seven subsequent one week sessions ending with a final meeting in March 2004. The final negotiations on the draft Legislative Guide were held during the thirty-seventh session of UNCITRAL in New York from 14 to 21 June 2004 and the text was adopted by consensus on 25 June 2004. Subsequently, on 2 December 2004, the General Assembly adopted resolution 59/40 in which appreciation for completion and adoption of the Legislative Guide was expressed. Part One of the Legislative Guide is entitled “Designing The Key Objectives and Structure of an Effective and Efficient Insolvency Law” and Part Two is entitled “Core Provisions for an Effective and Efficient Insolvency Law”. While Parts One and Two of the Legislative Guide were adopted on 25 June 2004, Part Three was only adopted on 1 July 2010. There is also Part Four of the Legislative Guide that was adopted on 18 July 2013 and deals with “Directors’ Obligations in the Period Approaching Insolvency”.

13.2 Purpose

The purpose of Legislative Guide – Part Three is to permit, in both domestic and cross-border contexts, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving those groups. The aim of doing this is to achieve a better, more effective result for the enterprise group as a whole and its creditors. At the same, the key objectives of recommendation 1 of the Legislative Guide[173] should be promoted as well as addressing recommendation 5 of the Legislative Guide.[174]

13.3 Content

Chapter I addresses general features of enterprise groups. Chapter II deals with the insolvency of group members in a domestic context. Insofar as additional issues arise by virtue of the group context, a number of recommendations are proposed to supplement the recommendations of Part Two of the Legislative Guide. Chapter III addresses the cross-border insolvency of enterprise groups. While building on the Model Law and the Practice Guide, it does not address issues pertinent to the insolvency of different group members in different States. Instead, it focuses on promoting cross-border co-operation in enterprise group insolvencies, forms of co-operation involving courts and insolvency representatives and the use of cross-border insolvency agreements.

13.4 Recommendations

Similar to Parts One and Two of the Legislative Guide, Part Three also contains a number of recommendations, starting with recommendation 199 and ending with recommendation 254. Part One contains recommendations 1-7 and Part Two contains recommendations 8 – 198.

13.4.1 Joint application (Recommendations 199-201)[175]

These recommendations deal with a joint application for the commencement of insolvency proceedings in regard to two or more enterprise group members as well as the joint application itself, the persons permitted to apply and the competent courts. In short, the purpose of a joint application is to:

a) facilitate a co-ordinated consideration of the application;
b) enable the court to obtain information concerning the enterprise group;
c) promote efficiency and reduce costs; and
d) To provide a mechanism to assess whether procedural co-ordination would be appropriate.

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[173] The key objectives listed in recommendation 1 of the Legislative Guide to establish and develop an effective insolvency law, are: (a) provide certainty in the market to promote economic stability and growth, (b) maximise value of assets, (c) strike a balance between liquidation and reorganisation, (d) ensure equitable treatment of similarly situated creditors, (e) provide for timely, efficient and impartial resolution of insolvency, (f) preserve the insolvency estate to allow equitable distribution to creditors, (g) ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information and (h) recognise existing creditors' rights and establish clear rules for the ranking of priority claims - Legislative Guide – Part One, p 14.

[174] Recommendation 5 of the Legislative Guide provides that the insolvency law should include a modern, harmonised and fair framework to address effectively instances of cross-border insolvency. Enactment of the Model Law is recommended - Legislative Guide – Part One, p 14.

[175] Part Three, pp 25-26.

13.4.2 Procedural co-ordination (Recommendations 202-210)[176]

These recommendations deal with procedural co-ordination, the purpose and content of such procedural co-ordination, the timing, the persons permitted to apply, modification or termination of the procedural co-ordination order, competent courts and notice.

13.4.3 Post-commencement finance (Recommendations 211-216)[177]

These recommendations deal with post-commencement finance, its purpose, post-commencement finance *provided by* a group member subject to insolvency proceedings to another group member subject to insolvency proceedings, post-commencement finance *obtained by* a group member subject to insolvency proceedings from another group member subject to insolvency proceedings, priority of post-commencement finance and security for post-commencement finance.

13.4.4 Avoidance provisions (Recommendations 217-218)[178]

These recommendations deal with avoidance provisions, their purpose, avoidance transactions and elements of avoidance and defences.

13.4.5 Substantive consolidation (Recommendations 219-231)[179]

These recommendations deal with substantive consolidation, its purpose, the principle of separate legal identity, exclusions from substantive consolidation, the application for substantive consolidation (timing and people permitted to apply), the effects of a substantive consolidation order, the treatment of security interests in substantive consolidation, recognition of priorities in substantive consolidation, meetings of creditors, calculation of the suspect period, modification of a substantive consolidation order, competent court and notice of substantive consolidation.

13.4.6 Appointment of insolvency representatives in an enterprise group context (Recommendations 232-236)[180]

These recommendations deal with the appointment of a single or the same insolvency representative, the purpose of appointment of insolvency representatives in an enterprise group context, conflict of interest, co-operation between two or more insolvency representatives, co-operation between two or more insolvency representatives in procedural co-ordination, and co-operation to the maximum extent possible between insolvency representatives.

13.4.7 Reorganisation plans (Recommendations 237-238)[181]

These recommendations deal with reorganisation plans, their purpose, co-ordinated reorganisation plans, and including a solvent group member in a reorganisation plan for an insolvent group member.

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176 *Idem*, pp 32-34.
177 *Idem*, pp 46-47.
178 *Idem*, pp 51-52.
179 *Idem*, pp 71-74.
180 *Idem*, pp 78-79.
181 *Idem*, p 82.

13.4.8 Access to court and recognition of foreign proceedings (Recommendation 239)[182]

This recommendation aims to ensure that for foreign insolvency proceedings in regard to enterprise group members, recognition should be available under applicable law as well as access to courts.

13.4.9 Co-operation involving courts (Recommendations 240-245)[183]

These recommendations deal with co-operation involving courts in the context of multinational enterprise groups, its purpose, co-operation between the court and foreign courts or foreign representative, co-operation to the maximum extent possible involving courts, conditions applicable to cross-border communication involving courts, effect of communication and co-ordination of hearings.

13.4.10 Co-operation between insolvency representatives and between insolvency representatives and foreign courts (Recommendations 246-250)[184]

These recommendations deal with co-operation between insolvency representatives and between insolvency representatives and foreign courts, its purpose, direct communication, and co-operation to the maximum extent possible.

13.4.11 Appointment of the insolvency representative in the context of multinational enterprise groups (Recommendations 251-252)[185]

These recommendations deal with the appointment of a single or the same insolvency representative, its purpose, and conflict of interest.

13.4.12 Cross-border insolvency agreements (Recommendations 253-254)[186]

These recommendations deal with cross-border insolvency agreements, their purpose, authority to enter into them and approval or implementation of cross-border insolvency agreements.

Self-Assessment Exercise 10

How does the Legislative Guide – Part Three, relate to the Model Law?

For commentary and feedback on self-assessment exercise 10, please see APPENDIX A

[182] *Idem*, p 89.
[183] *Idem*, pp 100-103.
[184] *Idem*, pp 104-105.
[185] *Idem*, p 107.
[186] *Idem*, pp 110-111.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

How did the Model Law come about and why? Explain also whether the chosen format (that is, a model law) was deliberate and what this format attempts to achieve.

Commentary and feedback on Self-assessment Exercise 1

On 23 June 1993, in its twenty-sixth session, UNCITRAL decided to pursue the issue of cross-border insolvency and the work on cross-border insolvency that ultimately resulted in the Model Law was primarily undertaken by UNCITRAL's WG V. The Model Law was adopted by UNCITRAL on 30 May 1997 and subsequently adopted by the General Assembly in a resolution of 15 December 1997.

The Model Law was established as a result of work done and pressure exerted by a number of groups, including INSOL and the IBA and during its development WG V took into account other international regulations and proposals from other non-governmental bodies.

The timing of the Model Law was not entirely accidental. In 1994, it was recognised in a colloquium held by UNCITRAL and INSOL that "practical problems caused by disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions." In 1995, the European Community unsuccessfully proposed the introduction of the European Convention on Insolvency Proceedings. A sense of urgency developed as practitioners were faced with diversity and often inconsistency in legal approaches applied to cross-border insolvencies and in the absence of statutory authorisation, many judges were unclear about the degree of discretion that might available to them in the context of cross-border insolvencies.

The "model law" format of the Model Law, which is not a convention or treaty, but merely a recommendation and a form of "soft law", is a recognition of the significant concerns that existed then (and still exist today) about the feasibility to harmonise rules on international aspects of insolvency. Historically, substantive laws and rules of insolvency have been jurisdiction specific. Those rules reflect the differences in laws, legal systems, political interest and self-interest that characterise each State. To harmonise such substantive rules on insolvency in a treaty would take a lot of time and may ultimately be unsuccessful. A "model law" format focused on procedural rules only limited to access, recognition, relief and coordination would not only be a lot less intrusive, but also allow each State to decide on its own whether or not to adopt the Model Law in whole or in part in its domestic legislation. Rather than forcing new (foreign) substantive insolvency laws on States, the Model Law aims instead to provide each State with a necessary procedural framework that brings with it a level of transparency and predictability to allow cross-border insolvencies to be dealt with in a more cost and time efficient manner avoiding value destruction and, where possible, allow for value creation.

The Model Law is in the flexible form of model legislation that takes into account diffing approaches in national insolvency laws and the varying propensities of States to co-operate and co-ordinate in insolvency matters.

Self-Assessment Exercise 2

Please answer the following questions by answering TRUE (T) or FALSE (F) only.

1. The Model Law aims to provide enacting States with additional, modern and efficient substantive insolvency law fit for cross-border insolvencies? [T/F]

2. The procedural framework the Model Law provides to enacting States aims to make cross-border insolvencies in the enacting State more transparent and predictable in outcome? [T/F]

3. While fitting and operating as an integral part of the existing insolvency law of the enacting State, the Model Law limits the enacting State's sovereignty because it introduces foreign law into the enacting State. [T/F]

4. With the enactment of the Model Law, a statutory basis is created in the enacting State for various forms of appropriate co-operation and direct communication between (foreign) courts and foreign representatives in cross-border insolvencies. [T/F]

Commentary and feedback on Self-assessment Exercise 2

1. False – The Model Law aims to provide a procedural framework for cooperation between jurisdictions and promotes a uniform approach to cross-border insolvency. The Model Law does **not** attempt a substantive unification of insolvency law.
2. True
3. False – While the Module law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems, it aims to leave the Enacting State's sovereignty untouched. This is evidenced by the existence of the public policy safeguard contained in article 6 of the Model Law which preserves the possibility of excluding or limiting any action in favour of the foreign proceeding on the basis of overriding public policy considerations. It is further evidenced by the fact that the Model Law does not specify how cooperation and communication may be achieved. This is left to each jurisdiction to determine by application of its own domestic laws and practices.
4. True

Self-Assessment Exercise 3

Question 1

Explain how the definitions of "foreign proceeding" and "foreign representative" limit the application of the Model Law.

Question 2

Explain why both the public policy exception and its restrictive application are important.

Commentary and feedback on Self-assessment Exercise 3

Question 1

Both the defined term "foreign proceeding" and "foreign representative" contain a number of requirements or characteristics in them that need to be met in order for a proceeding to qualify as a "foreign proceeding" and a representative to qualify as "foreign representative" within the meaning of the Model Law. If all elements are not met, an application under the Model Law will have to be denied.

For a proceeding to qualify as a "foreign proceeding" within the meaning of the Model Law it needs to meet the following elements:

1. **Collective nature**: While the proceeding may include an interim proceeding, it must be judicial or administrative and collective in nature
2. **Law related to insolvency**: The proceeding must be in a foreign State authorised or conducted under a law related to insolvency
3. **Subject to control or supervision by a foreign court**: the assets and affairs of the debtor must be subject to control or supervision by a foreign court; and
4. **Purpose of reorganisation or liquidation**: the proceeding must be for the purpose of reorganisation or liquidation.

For a representative to qualify as a "foreign representative" within the meaning of the Model Law the representative needs to meet the following elements:

1. **Appointed authorised person or body**: It needs to be an appointed person or body (including appointed on an interim basis) authorised in the foreign proceeding; and
2. **Administer debtor's assets or affairs or act as representative**: the authorisation of the representative is either to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding.

Question 2

For the enacting State to be comfortable that the Model Law is not going to limit or prejudice its sovereignty but will respect it, the public policy exception contained in article 6 of the Model Law is important. It gives the courts in the enacting State the necessary discretion to deny applications that are manifestly contrary to the public policy of the enacting State. At the same time, the success of the Model Law to a great extent depends on consistent application which will outcomes to be more predictable. This predictability of outcome is key for investors and debtors alike to get comfortable on a State's ability to appropriately deal with cross-border insolvencies. Therefore, a restrictive interpretation and application of the "public policy exception" is equally important and ensured by the requirement that for the "public policy exception" to apply an application must be **manifestly** contrary to the public policy of the enacting State.

Self-Assessment Exercise 4

Explain how access rights and non-discrimination principles in Chapter II of the Model Law may give foreign investors comfort in the jurisdiction of the enacting State.

Commentary and feedback on Self-assessment Exercise 4

The access rights provided to the foreign representative in article 9 of the Model Law give the foreign representative standing before the courts in the enacting State without the need for the foreign proceeding opened in the foreign State to recognised in the enacting State. Article 11 of the Model Law also gives the foreign representative standing to open domestic insolvency proceedings in the enacting State, provided that all requirements for such an opening are otherwise met. Article 13 of the Model Law gives foreign creditors the same rights as creditors domiciled in the enacting State without affecting the ranking of claims in the enacting State. However, a claim of a foreign creditor cannot be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor.

These access rights, together with the safe conduct rule of article 10 of the Model Law, should give foreign investors comfort because these rights ensure that local tools are available to the foreign representative without the need for any separate proceedings in the enacting State to obtain such standing. This saves time and cost, both of which are very important in cross-border insolvencies. As a result, foreign creditors could be comfortable that recoveries are being maximised without being burdened with unnecessary domestic proceedings and without the standing creating any adverse jurisdictional consequences in the enacting State. The foreign creditors will further take comfort from the fact that Model Law articles implemented in the enacting State will be breached if foreign creditors are being discriminated against or not provided with timely notice (as ensured by article 14 of the Model Law). With standing before the local courts, the foreign representative would be able to raise such breaches, and also that should give the foreign investors further comfort.

Self-Assessment Exercise 5

Question 1

How is a court in an enacting State likely to rule on a request for recognition of a foreign proceeding opened in a foreign State where the debtor has certain assets? Explain the steps the court will have to take.

Question 2

Would your answer be different if the debtor had its registered office in the foreign State, but not its COMI?

Commentary and feedback on Self-assessment Exercise 5

Question 1

In accordance with article 17(1)(a) and (b) of the Model Law, the court in the enacting State will first assess whether the foreign proceeding and the foreign representative meet all the required characteristics as set forth in the definitions of those terms in article 2 of the Model Law and in this respect the court is entitled to rely on the presumptions set forth in Article 16(1) of the Model Law..

Assuming that (i) both the foreign proceeding and the foreign representative meet all required characteristics, (ii) there are no grounds to invoke the public policy exception of article 6 of the Model Law and (iii) also the requirements set forth in article 17(1)© and (d) of the Model Law are met, the court in the enacting State will need to determine – in accordance with article 17(2) of the Model Law – whether the debtor's COMI is in the foreign State in which the foreign proceedings are opened, in which case the foreign proceedings can be recognised as foreign main proceedings, or whether the debtor has an establishment in the foreign State where the foreign proceedings were opened, in which case the foreign proceedings can be recognised as foreign non-main proceedings.

If the debtor only has "certain assets" in the foreign State and nothing else, it is unlikely that the court in the enacting State will conclude that the COMI of the debtor is in the foreign State. An "establishment" is defined in article 2(f) of the Model Law as "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*" The existence of certain assets of the debtor in the foreign State seems – on its own without anything else –also unlikely to convince the court in the enacting State that there is an establishment.

If neither the COMI nor an establishment of the debtor exists in the foreign State where the foreign proceedings were opened, then the court in the enacting State will have to deny the recognition application.

Question 2

While – according to the interpretation of the COMI under the EIR which is followed for purposes of the Model Law and article 16(3) of the Model Law – there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI, here it is a given that the COMI of the debtor is not in the foreign State where the foreign proceedings were opened. Therefore, the court in the enacting State will again have to assess whether or not an establishment of the debtor exists in the foreign State. The fact that the registered office of the debtor is in the foreign State seems again – on its own and without anything else – to be insufficient to conclude that the debtor has an establishment in the foreign State. Therefore, the answer here would not be different from the answer to question 1.

Self-Assessment Exercise 6

Explain how co-operation under the Model Law relates to access and recognition under the Model Law?

Commentary and feedback on Self-assessment Exercise 6

The objective of co-operation is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results as well as to help promote consistency of treatment of stakeholders in cross-border insolvencies across jurisdictions. The access rights in the Model Law that provide foreign representatives standing before courts in the enacting State (without the need for separate proceedings to achieve such standing) clearly facilitate co-operation as they allow foreign representatives to communicate with the court. That co-operation is further facilitated by recognition of the foreign proceedings which allow the court to provide the foreign representative with appropriate and more-tailor made relief, as and when required. This in turn promotes optimal results. However, co-operation is not dependent on recognition and the Model Law is not prescriptive in what appropriate co-operation is in any given circumstances, but instead provides a procedural framework to allow co-operation to take place and the Model Law further provides – by way of guidance – a non-exhaustive list of appropriate means of co-operation. Access rights and recognition should therefore be used and understood in conjunction with co-operation as procedural tools the Model Law makes available to enable better results being achieved in cross-border insolvencies. In this context it should further be noted that the anti-discrimination principles applicable to foreign creditors as provided for in the Model Law promote consistency of treatment of stakeholders in cross-border insolvencies, which is also one of the goals co-ordination in the Model Law aims to achieve.

Self-Assessment Exercise 7

Question 1

Discuss whether you, in view of the policy underlying the Model Law, find the supremacy of domestic insolvency proceedings understandable or surprising, or perhaps both.

Question 2

Answer True or False to the following questions:

2.1 An enacting State requiring at least an establishment in its own jurisdiction for the commencement of domestic insolvency proceedings, violates article 28 of the Model Law. [T/F]

2.2 A domestic insolvency proceeding in the enacting State cannot include foreign assets of the foreign debtor. [T/F]

2.3 If a domestic insolvency proceeding already exists in the enacting State when a foreign main proceeding is recognised, there is no automatic relief pursuant to Article 20 of the Model Law. [T/F]

2.4 If after a foreign non-main proceeding is recognised, a domestic insolvency proceeding is opened in the enacting State, the recognition of the non-main proceeding terminates. [T/F]

2.5 For the opening of a domestic insolvency proceeding in the enacting State, there is a rebuttable presumption that the recognition of a foreign non-main proceeding is proof that the debtor is insolvent. [T/F]

Commentary and feedback on Self-assessment Exercise 7

Question 1

In particular for those enacting States that may have concerns about the Model Law limiting their sovereignty it should provide additional comfort to read in article 29 of the Model Law that – in case of a concurrence of foreign proceedings and domestic proceedings – primacy is given to domestic proceedings. Viewed in that light, it could therefore be said that the supremacy of domestic proceedings is understandable.

However, if the foreign proceedings are main proceedings this primacy of domestic proceedings may not in all circumstances be appropriate. This could in particular apply to those situations where the domestic proceedings limit their scope to domestic interests only and the best interests of the debtor's stakeholders generally in both the foreign main proceedings and the domestic proceedings differs from those domestic interests. In this context it is further important to keep in mind that the procedural framework provided by the Model Law aims to avoid the need to open any separate domestic proceedings because with recognition and relief (both interim and post-recognition relief) the expectation is that a situation can be created "as if" a domestic proceeding has been opened, without the need for actually opening one. Viewed in that light, the supremacy of domestic proceedings could be considered a bit surprising as well.

Question 2

2.1 False. While article 28 of the Model Law only requires the debtor to have assets in the enacting State in order to open domestic proceedings, it is not contrary to the policy underlying the Model Law for the enacting State to adopt a more restrictive test, such as requiring the debtor to at least have an establishment in the enacting State.

2.2 False. Article 28 of the Model Law allows for domestic proceedings to be extended to include foreign assets provided that (i) the extension is necessary to implement co-operation and co-ordination under articles 25-27 of the Model Law and (ii) the foreign assets included in the extension must be administered under the domestic law of the enacting State.

2.3 True. See article 29(a)(ii) of the Model Law.

2.4 False. Pursuant to article 29(b)(i) and (c) of the Model Law the court in the enacting State needs to review any relief granted under article 19 or 21 of the Model Law in the foreign non-main proceeding and that relief (not the recognition) shall only be modified or terminated if inconsistent with the domestic proceedings that have been opened.

2.5 False. According to article 31 of the Model Law the rebuttable presumption of insolvency only applies to the recognition of a foreign main proceeding, not a foreign non-main proceeding.

Self-Assessment Exercise 8

How does the Practice Guide compare to the co-operation provisions contained in the Model Law?

Commentary and feedback on Self-assessment Exercise 8

While the co-operation provisions contained in the Model Law aim to provide judges in the enacting State with a statutory basis for co-operation and for those jurisdictions that lack a legislative framework for co-operation and co-ordination, the Model Law fills a gap by expressly empowering courts to extend co-operation in certain specific areas. The Model Law is not prescriptive regarding what type of co-operation or co-ordination is most appropriate in any given set of circumstances, but only provides an illustrative, non-exhaustive list of appropriate means of co-operation. The Practice Guide supplements the provisions in the Model Law by providing more information for practitioners and judges on the practical aspects of co-ordination and communication. The focus of the Practice guide is on the use and negotiation of cross-border insolvency agreements (or "protocols"). Collective experience and practice are shared and analysed in the Practice Guide, which also contains a great number of sample clauses developed and used in practice as well as a summary of 44 cases in which cross-border insolvency agreements were concluded.

Self-Assessment Exercise 9

How does the Judicial Perspective relate to the UNCITRAL Guide to Enactment?

Commentary and feedback on Self-assessment Exercise 9

The UNCITRAL Guide to Enactment provides an article-by-article analysis, commentary and interpretation of the Model Law. The first version came out in 1997 and there was an undated version in 2014. While the Judicial Perspective also provides analysis, commentary and interpretation of the Model Law it does so from a judge's perspective and not on an article-by-article basis, but in an order to tries to reflect the sequence in which particular decisions would generally be made by a receiving court under the Model Law. The Judicial Perspective came out in 2011 and was also updated in 2014 alongside the UNCITRAL Guide to Enactment. In an Annex to the Judicial Perspective, 30 Model Law decisions in various enacting States are summarised and throughout the text of the Judicial Perspective references to these Model Law cases are made, where appropriate. When discussing the various provisions of the Model Law in this guidance text, you will have seen that references have been made to both the UNCITRAL Guide to Enactment and the Judicial Perspective as they very much cover the same ground albeit from a different perspective and in a different order.

Self-Assessment Exercise 10

How does the Legislative Guide – Part Three, relate to the Model Law?

Commentary and feedback on Self-assessment Exercise 10

The Legislative Guide is another significant project of UNCITRAL Working Group V, which was also the architect of the Model Law. Part Three of the Legislative Guide focuses on the treatment, in both domestic and cross-border contexts, of enterprise group members within the context of the enterprise group and addresses issues particular to insolvency proceedings involving these groups. Cross-border insolvency of enterprise groups is dealt with in Chapter III of the Legislative Guide – Part Three. While building on the Model Law and the Practice Guide, it does not address issues pertinent to the insolvency of different group members in different States. Instead, it focuses on promoting cross-border co-operation in enterprise group insolvencies, forms of co-operation involving courts and insolvency representatives and the use of cross-border insolvency agreements.

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